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Supreme Court, U.S.
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In The

Supreme Court of the United States

DORA GARCIA CISNEROS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID L. BOTSFORD
Counsel of Record
Texas Bar No. 02687950
BOTSFORD & ROARK
1307 West Ave.
Austin, Texas 78701
512-479-8030 (Phone)
512-479-8040 (Fax)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court should exercise its supervisory power and grant a certificate of appealability (COA) because, contrary to prior opinions of this Court, the Fifth Circuit, and other Courts of Appeals, Cisneros demonstrated the district court's resolution of her claims are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the questions are adequate to deserve encouragement to proceed further.

PARTIES TO THE PROCEEDING

Petitioner is Dora Garcia Cisneros, defendant-appellant below.

Respondent is the United States of America, who has lawful custody of petitioner pursuant to her life sentence without possibility of parole.

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OPINIONS BELOW

The orders of the district court denying Cisneros' motion for discovery, motion to vacate and motion for certificate of appealability (hereinafter COA) are contained at App. 155, 60 and 4, respectively. The order of United States Circuit Judge Reavley denying Cisneros' COA is at App. 1. Upon reconsideration, a panel of the Fifth Circuit also denied COA. App. 161.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2255. The Fifth Circuit had jurisdiction to consider the issuance of COA pursuant to 28 U.S.C. § 2253(c)(1)(B). This Court has jurisdiction to consider the Fifth Circuit's denial of COA under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V: No person shall . . . be deprived of life, liberty, or property, without due process of law.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1958 (1993): (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than ten years or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.

(b) As used in this section and section 1959 –

> (1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a

> commercial interest, or anything else the primary significance of which is economic advantage;
>
> (2) "facility of interstate commerce" includes means of transportation and communication; and
>
> (3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

STATEMENT OF THE CASE

Cisneros was convicted in Texas state court for the capital murder of Albert "Joey" Fischer. Cisneros appealed and on January 25, 1996, the Texas appellate court reversed her conviction due to insufficient evidence. *Cisneros v. State*, 915 S.W.2d 217 (Tex. App. – Corpus Christi 1996), *pdr ref'd*, 935 S.W.2d 789 (Tex.Crim.App.1996).

On February 23, 1998, Cisneros was indicted in United States District Court for the offense of murder for hire, in violation of 18 U.S.C. § 1958. 1R577. The one count indictment alleged that:

> From in or about September 1992 to on or about April 6, 1993, in the Southern District of Texas and elsewhere and within the jurisdiction of the Court, the Defendants DORA GARCIA CISNEROS and RAMON PALOMARES did cause another to travel in foreign

> commerce and cause another to use a facility in foreign commerce, namely telephone communications facilities, with the intent that the murder of Albert Joseph (Joey) Fischer, Jr. be committed in violation of the laws of the State of Texas as consideration for a promise and agreement to pay, and the receipt of, $3,000 in United States currency. In violation of Title 18, United States Code, Section 1958 and Section 2.

The Government's bill of particulars stated that:

> The evidence in this case will show that, in regards to foreign travel, that Heriberto Pizana and/or other persons unknown traveled from Mexico to Brownsville, Texas, via an international bridge on or about March 2, 1993.
>
> * * *
>
> The evidence in this case will show, in regards to use of telephone communications facilities in foreign commerce, that Daniel Garza used telephone facilities in San Fernando, Tamaulipas, Mexico, and in Matamoros, Tamaulipas, Mexico, to call Maria Martinez in Brownsville, Texas, from in or about November 1992 to in or about February 1993.

Accordingly, the indictment and bill of particulars only reflected two **possible** evidentiary bases to potentially sustain federal jurisdiction: (1) phone calls made from Mexico to Brownsville from Daniel Garza

to Maria Martinez, Garza's "curandera" (i.e., the alleged go-between between Garza and Cisneros);[1] and (2) entry by an automobile from Matamoros, Mexico, to Brownsville, Texas, on the evening of March 2, 1993. These two potential evidentiary bases were both based on alleged foreign commerce and they will be referred to as the two potential foreign commerce bases or prongs of the first element of 18 U.S.C. § 1958.

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[1] It was the Government's position that in at least one of four calls (11R1366) by Garza (who lived in San Antonio, Texas, 11R1355, 1400, 1419, but who had traveled to Mexico to see family members, 11R1402-1403, and harvest land, 11R1422) to Martinez from Mexico, Martinez initiated discussion of the alleged murder for hire scheme. Each of the four alleged calls from Mexico made by Garza to Martinez were for the purpose of receiving her advice about his own marital problems. 11R1367. During at least **one** of these four calls from Mexico, Martinez broached the topic of the "job" (then merely a paid assault), **but Garza lied to her about having obtained someone to do it**. 11R1368. The time frame of the calls were from late 1992 to early 1993, but it was not until late January 1993 or early February 1993 that Martinez modified the scheme from one involving only a beating of Fischer to one of killing Fischer. 11R1360-1363. Furthermore, all of Garza's alleged calls from Mexico occurred prior to February 14, 1993, **which the government conceded to be accurate in its post oral argument submission at pages 3-4**, yet the indictment was not returned until February 23, 1998, more than five years after the commission of the offense of murder for hire was completed. This governmental concession in the Fifth Circuit was never addressed by the Fifth Circuit or the district court herein. It relates to Cisneros' Third COA Issue.

Cisneros was eventually convicted and sentenced to life. 13R7. On direct appeal to the Fifth Circuit, a panel affirmed. *United States v. Cisneros*, 194 F.3d 626 (5th Cir. 1999). In response to Cisneros' motion for rehearing, the original panel opinion was vacated and a second panel opinion issued. *United States v. Cisneros*, 203 F.3d 333 (5th Cir. 2000). Cisneros filed a motion for panel rehearing and a suggestion for rehearing *en banc*. Without ruling on Cisneros' motions for rehearing, the Fifth Circuit *sua sponte* ordered *en banc* review in Cisneros' case, along with *United States v. Marek*, 198 F.3d 532 (5th Cir. 2000). Thus, the panel's second opinion was also vacated. *United States v. Cisneros*, 206 F.3d 448 (5th Cir. 2000). By consolidating Cisneros' case with *Marek*, the *en banc* Court indicated a concern with a conflict of interpretation that had developed between the panel opinions in *Marek* and the second panel opinion in *Cisneros* over whether, in order to satisfy the jurisdictional element of 18 U.S.C. § 1958, a "facility" must be used in an interstate fashion. The Fifth Circuit subsequently noted that this issue was only dicta in the second *Cisneros* panel opinion. *United States v. Marek*, 238 F.3d 310, 313 (5th Cir. 2001). The Fifth Circuit subsequently issued its *en banc* opinion. *United States v. Marek*, 238 F.3d 310 (5th Cir. 2001). The opinion addressed only the issue of conflict between *Marek* and the second, vacated panel opinion in *Cisneros*, and did not restore those parts of either of the prior opinions in *Cisneros* that addressed the issues that Cisneros actually had raised and repeatedly had sought to preserve for appellate

review. The *en banc* Court also radically altered and totally distorted the facts of Cisneros' case in a manner at odds with the record, the Government's opening statement and both panel opinions, finding that the "hit" men had traveled from Mexico to Texas when neither vacated panel opinion had even addressed that issue.[2]

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[2] The first and second panel opinions addressed the foreign telephone calls, mentioned the vehicle crossing, but avoided resolution of the car crossing as a "more complicated issue." *See United States v. Cisneros*, 194 F.3d 626 at 637 and *United States v. Cisneros*, 203 F.3d 333 at 345, stating the following:

> We now turn to a development of uncertain connection to the hired killers, but one that we must mention. At 6:39 that evening, a car crossed into the United States from Mexico at the Brownsville point of entry. Border authorities recorded its Mexican license plate number as "821 THE7". A vehicle with that plate had crossed the border eighteen times between August 1992 and March 1993. At 8:26 p.m., Pizana and Ramon Palomares, another Cuellar hit man, checked into the La Quinta Inn. The receptionist registered their car as a white Grand Marquis with Mexican plates. Her handwriting made it hard to decipher whether the plate number was "821 TWEX" or "821 THE7".

See 194 F.3d at 630; 203 F.3d at 338. As pointed out on motion for rehearing to the *en banc* Fifth Circuit from the decision in *Marek*, Garza arranged for the hit men to do the "hit" when he was in Dallas on about February 14, 1993, 11R1370, and they agreed to do the "hit" whenever they would next travel from Dallas to Brownsville, 11R1172-1174. Garza also testified that the "hit men" traveled from Dallas to Brownsville immediately before the "hit" (after Garza had purchased a pistol in Dallas and gave it to Victor Moreno), 8R576, and the Government's

(Continued on following page)

On January 15, 2001, Cisneros timely filed a motion for rehearing from the *en banc* opinion on the grounds that: (1) the *en banc* opinion reflected totally novel "uncontroverted facts" that were materially incorrect and clearly contrary to the evidence presented by the Government during its case-in-chief; and (2) the *en banc* Court only addressed one of the numerous issues on appeal, an issue in fact created by the Court's grant of *en banc* review (vacating the second panel opinion, which in turn had vacated the original panel opinion), and thus denied Cisneros her right to appellate review of her issues and substantially impaired her ability to seek certiorari to the Supreme Court. Cisneros urged the Fifth Circuit to grant rehearing *en banc* for factual correction and, then, either to address (*en banc* or panel) the issues which had been vacated or to reinstate those parts of the vacated second panel opinion that were not addressed in the *en banc* opinion so that she might retain her right to a full, fair and meaningful appeal, including certiorari to the Supreme Court. Rehearing was denied without written opinion and the second, vacated panel opinion was not reinstated. A timely filed petition for writ of certiorari was denied. *Cisneros v. United States*, 534 U.S. 813, 122 S.Ct. 37, 151 L.Ed.2d 11 (2001).

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opening statement admitted that the "hit-men" traveled from Dallas to Brownsville. 6R97.

Cisneros subsequently filed a motion to vacate in the district court, raising not only issues which had been addressed by the vacated panel opinions but not reinstated by the *en banc* Fifth Circuit, but also raising non-record claims including suppression, perjury and ineffective assistance of counsel, supported seventeen exhibits. The district court (who did not preside over the trial) upheld the magistrate judge's recommendation to deny discovery, USCA5 331, adopted the magistrate judge's recommendation that all relief be denied without holding an evidentiary hearing, USCA5 441-461, and, after Cisneros filed a COA, adopted the magistrate's recommendation that COA be denied as to all nine of Cisneros' COA issues. USCA5 647-649. Cisneros timely filed a notice of appeal, USCA5 462, and sought COA from the Fifth Circuit on the following issues:

> **First COA Issue:** Whether a reasonable jurist could find that Cisneros was denied her rights to due process and a meaningful appeal by the Fifth Circuit's failure to restore those parts of its second panel decision not inconsistent with its holding in *Marek*.
>
> **Second COA Issue:** Whether a reasonable jurist could find that the evidence upon which Cisneros was convicted is legally insufficient, in violation of her right to due process under the Fifth Amendment.
>
> **Third COA Issue:** Whether a reasonable jurist could find that the district court erred by denying Cisneros' requested instruction on the statute of limitations.

Fourth COA Issue: Whether a reasonable jurist could find that the alleged jurisdictional nexus (i.e. Garza's alleged calls from Mexico or the car crossing) had an insufficient relationship to the alleged murder for hire scheme to satisfy the jurisdictional element.

Fifth COA Issue: Whether a reasonable jurist could find that Cisneros was denied her Fifth and Sixth Amendment rights to due process, a jury trial, and a reliable jury verdict because the jury was not instructed (or, if instructed in the legal sense, not adequately instructed) on "causation" *and* whether the foreign commerce had to "facilitate" or "be in furtherance" of the alleged murder for hire scheme, two essential components of the first element of the offense.

Sixth COA Issue: Whether a reasonable jurist could find that Cisneros was denied her right to due process by the prosecution's non-disclosure of the sequence of events surrounding Daniel Garza's gross modification of his story (as reflected by comparing his statements to the FBI on February 5 and 18, 1998, to his testimony on May 11, 1998, at Cisneros' trial) and/or by the prosecution's use of Daniel Garza's false testimony and creation of a false impression for the jury utilizing that testimony.

Seventh COA Issue: Whether a reasonable jurist could find that Cisneros was denied her right to effective assistance of trial

counsel, as guaranteed by the Sixth Amendment to the Constitution of the United States, by her trial counsels' acts and omissions.

Eighth COA Issue: Whether a reasonable jurist could find that Cisneros was denied her right to effective assistance of appellate counsel, as guaranteed by the Sixth Amendment to the Constitution of the United States, by her appellate counsels' acts and omissions.

Ninth COA Issue: Whether a reasonable jurist could find that the district court abused its discretion in denying Cisneros expansion of the record through discovery and an evidentiary hearing.

On May 28, 2008, United States Circuit Judge Reavley issued a brief order reciting the essence of Cisneros' COA issues concluding, without any analysis, that "Cisneros fails to show that reasonable jurists would disagree that the district court's resolution of her claims or that her issues deserve encouragement to proceed further," citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). App. 1. Because the order denying COA conflicts with and is inconsistent with prior decisions of the Supreme Court and the Fifth Circuit, reconsideration was sought. Reconsideration was summarily denied by the Fifth Circuit. App. 161.

REASONS FOR REVIEW

Given the proper standard for COA, this Court should grant COA as to Cisneros' issues and remand the case to the Fifth Circuit for full briefing on the merits. As demonstrated below, the Fifth Circuit's denial of COA is contrary to the proper standard for COA and conflicts with prior opinions of the Supreme Court, the Fifth Circuit and other Courts of Appeals.

1. COA Standard.

The standard for obtaining a certificate of appealability is identical to the standard for the former certificate of probable cause to appeal. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ("§ 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*, 463 U.S., at 894."). A certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). According to the Court, a petitioner need not show a likelihood of prevailing on the merits to obtain a certificate. *Barefoot*, 463 U.S. at 893. Rather, a certificate should issue if the petitioner can show that "the issues are debatable among jurists of reason; that a court ***could*** resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983) (citations and internal quotation marks omitted, emphasis in original).

The Court's emphasis on *could* indicates that a petitioner need not show that any other court in fact *has resolved* the issues differently. A petitioner must only suggest a basis upon which the issues *could* be resolved differently by reasonable jurists. "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). "The question is the debatability of the underlying claim, not the resolution of that debate." *Id.* at 342. The importance of an issue or the fact that it is one of first impression may also mean that it qualifies for a certificate of appealability because it "deserve[s] encouragement to proceed further." *Barefoot, supra*; *Houston v. Lack*, 487 U.S. 266, 269 (1988). In essence, a certificate of appealability "generally should indicate that an appeal **is not legally frivolous**." *Barefoot*, 463 U.S. at 894 (emphasis added); *James v. Cain*, 50 F.3d 1327, 1330 (5th Cir. 1995) (same, citing *Barefoot*). A court should grant a certificate of appealability unless the issue is "squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case." *Barefoot*, 463 U.S. at 894.

2. The Failure To Fully Consider The Entire COA Standard.

The May 28, 2008, Order denying COA failed to reflect any consideration of Cisneros' life sentence without parole. The severity of Cisneros' sentence

may properly be considered in determining whether to grant COA and the Fifth Circuit was required to resolve any doubts regarding COA in Cisneros' favor. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997). Additionally, the lack of precedent on point regarding the proper disposition of a claim provides a reasonable basis for the granting of COA. *Gonzalez v. Crosby*, 545 U.S. 524, 544 (2005) (Breyer, J., concurring). Indeed, the importance of an issue or the fact that it is one of first impression may also mean that it qualifies for COA because it "deserve[s] encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983). Viewing Cisneros' first five COA issues with the above considerations in mind, and given the district court's numerous references to the "unique opportunity," the "novel situation," and at least one "unusual complaint" presented by Cisneros' 2255, App. at 60, 71, and 81-82, certiorari should be granted, COA issued and the case remanded to the Fifth Circuit for consideration of the merits of her COA issues.

3. As To Cisneros' First COA Issue, Ample Authority Supporting The Issuance Of COA Was Provided.

The first five COA issues related to the vacated second panel opinion and Cisneros' Claims For Relief Nos. 1 through 6. In her First COA Issue, Cisneros explained (with ample citation of authority from the Fifth Circuit and this Court) why she had been denied a meaningful appeal (i.e., Cisneros' legal issues,

addressed by the vacated original panel opinion and also addressed by the vacated second panel opinion, but not reinstated by the *en banc* opinion, had not legally been considered and ruled upon by the Fifth Circuit). The district court's speculation that the *en banc* Fifth Circuit considered issues upon which *en banc* review had not been granted is insufficient to negate the proposition that this was a novel issue debatable among jurists of reason, as supported by the citation of authorities clearly supporting the conclusion that a vacated opinion was "simply a nullity."[3] Similarly, the district court's conclusion that "matters rejected on appeal cannot be re-attacked collaterally pursuant to 28 U.S.C. § 2255," App. at 86 (i.e., USCA5 at 460), is clearly contrary to Supreme Court precedent. *See Kaufman v. United States*, 394

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[3] A reasonable jurist could find that the *en banc* Fifth Circuit's failure to reinstate the issues deprived Cisneros of a judgment or decision on those issues that could be reviewable by the Supreme Court on certiorari, because the second panel decision was "simply a nullity." Thomas Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. Cent. L. J. 139, 157 (2003); William Atkins, *The History and Subsequent Demise of Vacatur Upon Settlement by the Federal Circuit*, J. Pat. & Trademark Off. Soc'y 295, 298 & n.14 (1996) ("Virtually all U.S. Courts of Appeal have likewise held that vacated judgments should not be considered persuasive authority, or, at least, have no stare decisis effects."); *Chandler v. System Council U-19*, No. CV85-AR-1948-S, slip op. at 4 (N.D. Ala. Oct. 20, 1986), available in LEXIS, Genfed Library, Dist File ("A decision which is vacated has no precedential value, and for all intents and purposes never existed"); *United States v. Sarmiento-Rozo*, 592 F.2d 1318, 1321 (5th Cir. 1979) (vacatur "removes any res judicata or precedential effect which the judgment might otherwise have").

U.S. 217, 227 n. 8 (1969) (holding that res judicata does not bar section 2255 relief of constitutional issues, although a district court has discretion to refuse to reach the merits of a constitutional claim that had already been raised and resolved on direct appeal). Furthermore, neither the district court nor the Fifth Circuit addressed Cisneros' assertion that *Kaufman* controlled and that, even if it did not, the *third exception* to the law of the case doctrine (which provides that the doctrine will not apply when the prior decision was clearly erroneous and would work a manifest injustice) should have been invoked to permit her to raise claims in her motion to vacate which had been addressed in the first and second vacated panel opinions. *See United States v. Gochicoa*, 238 F.3d 278, 290-292 (5th Cir. 2001) (Dennis, J., concurring in part and dissenting in part); *Hopwood v. State of Texas*, 236 F.3d 256, 272-275 (5th Cir. 2000); *United States v. O'Keefe*, 169 F.3d 281, 282-284 (5th Cir. 1999) (Dennis, J., dissenting); *United States v. Becerra*, 155 F.3d 740, 752-756 (5th Cir. 1998). Under the foregoing cases, the third exception to the law of the case doctrine clearly should have been declared available to Cisneros in the district court because the vacated panel opinions were **"dead wrong,"** clearly erroneous and would work a manifest injustice.

Additionally, Cisneros pointed out that the district court itself previously had reviewed an allegation of the denial of a meaningful appeal, pointing out the Fifth Circuit's ultimate resolution of that issue on

COA was distinguishable from Cisneros' situation. *See United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999).[4] Because, as demonstrated in footnote 4, *supra*, Cisneros is distinguishable from *Garza*, COA on her First COA Issue should have been granted by the Fifth Circuit as it is not "legally frivolous" and is certainly novel and deserving of encouragement.[5]

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[4] In *Garza*, the movant complained that the Fifth Circuit's direct appeal decision in his case did not comport with meaningful review because the Fifth Circuit did not expressly address one of the issues he raised. The Fifth Circuit recognized the right of meaningful review, but noted that a "litigant's right to have all issues fully considered and ruled on by the appellate court does not equate to a right to a full written opinion on every issue raised." *Id.* The Fifth Circuit held that it was "apparent" from its own opinion on direct review that the complained of issue received "full consideration and a ruling" because the direct appeal opinion made two express general findings of "no reversible error." At the beginning of the opinion, there was a "clear, general finding of 'no reversible error'" and at the end another statement, "Garza has shown no error." *Id.* The Court concluded, "Each of these statements is broad enough to encompass Garza's challenge to the [missing issue]." *Id.* As pointed out in Cisneros' COA, there is no such language in the *Marek* decision which is all that remains of Cisneros' appeal. Cisneros' situation is thus quite distinguishable from *Garza*, reflecting that reasonable jurists could in fact debate the outcome of the issue.

[5] Reasonable jurists could not doubt that neither *Marek* nor the vacated panel decisions in *Cisneros* have any res judicata or precedential bearing on whether COA should be granted on Cisneros' Second through the Sixth COA Issues, particularly given the holding of the Supreme Court in *Kaufman*, *supra*.

4. The Failure To Consider Authorities From The Supreme Court, The Fifth Circuit And Other Courts Regarding The Instructions On "Causation" And "The Required Relationship," Two Essential Components of The First Element Under The Murder For Hire Statute.

As developed in detail in the motion to vacate and COA's to the district court and the Fifth Circuit, the absence of appropriate jury instructions on "causation" *and* whether the foreign commerce had to "facilitate" or "be in furtherance of" the alleged murder for hire scheme, two essential components of the first element of the offense, were raised within the context of Cisneros' First, Fourth, Fifth, Seventh and Eighth COA Issues as substantive claims or as components of ineffective assistance of counsel (trial and appellate). Cisneros asserts that reasonable jurists easily could disagree on both the substantive claims and, assuming there was in fact procedural default, whether there was cause and prejudice for the ineffective assistance of counsel claims.

A. The Causation Instruction The district court held that Cisneros could not prevail on her claim that her Fifth and Sixth amendment rights were violated by its failure to instruct on causation, because the "causation instruction submitted by Cisneros . . . was not a correct statement of the law." App. 79. That causation instruction was submitted as Requested Instruction No. 15A, and was supported as well by Requested Instruction No. 14. Another

reasonable jurist could well disagree with the district court that Cisneros gave an incorrect statement of the law when she submitted the following:

> A person 'causes' another to travel in foreign commerce or to use facilities in foreign commerce if he does *an act with knowledge* that the foreign travel or use of facilities in foreign commerce will follow in the ordinary course of business, or where such foreign travel or use of facilities in foreign commerce *can reasonably be foreseen*, even though not actually intended. 2R140 (Requested Instruction No. 15A).

A reasonable jurist could differ, in the first place, because as Cisneros pointed out in her motion to vacate, USCA5 58 n. 37, the above instruction is taken from *United States v. Sneed*, 63 F.3d 381, 385 n. 4 (5th Cir. 1995), quoting the Supreme Court in *Pereira v. United States*, 347 U.S. 1, 8-9 (1954), applying the language the Supreme Court has mandated in regard to whether a person 'causes' the mails to be used within the meaning of the mail fraud statute, 18 U.S.C. § 1341. As noted in the motion, a federal district court followed this analysis while acquitting a defendant of murder for hire, rejecting the government's "but for" causation argument that the jurisdictional nexus would be sufficiently proven if a phone call was shown to simply "relate to" the murder for hire scheme. *United States v. Sullivan*, 809 F. Supp. 934, 936-937 (N.D. Ga. 1992). *Sullivan* specifically held that the evidence was insufficient to show the "relate to" relationship, much less that the use of the

telephone in that case "facilitated" the murder. *Id.* at 937-938.

A reasonable jurist could also differ because the Supreme Court endorses the same standard requiring proof that the defendant could have "reasonably foreseen" that the acts (travel or use of facilities) would form a nexus with the murder. *Henderson v. Kibbe*, 431 U.S. 145 (1977) (finding that criminal causation requires an objective reference to mental state). The "causation" standard in 18 U.S.C. § 2(b) incorporates a "willful" mental element: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." In *Henderson*, the Court observed that the "New York Court of Appeals concluded that the evidence of causation was sufficient because it can be said beyond a reasonable doubt that the 'ultimate harm' was 'something which should have been foreseen as being reasonably related to the acts of the accused.'" *Henderson*, 431 U.S. at 155. The *Henderson* Court found, therefore, that the following would have been an adequate instruction on causation in its state law case:

> [I]f the ultimate harm ***should have been foreseen*** as being reasonably related to the defendant's conduct, that conduct should be regarded as having caused the death of Stafford.

Henderson, 431 U.S. at 155 (emphasis added). This foreseeability standard is far less onerous on the

government than "willfulness." The Supreme Court ultimately found no harm in the absence of an instruction on causation because the jury had to find, at least, that the defendant acted "recklessly." The Court found that the jury's necessary finding of the recklessness *mens rea* for the state law crime of second degree murder – being aware of and consciously disregarding a substantial and unjustifiable risk – would have included a determination that the ultimate harm was foreseeable to the defendant. *Id.* at 157.

In the instant case, *it is absolutely impossible* to infer from the facts that Cisneros could have intended, known the risk, or even foreseen that her alleged acts in contacting the curandera could have caused interstate or international communication or transportation to occur. Thus, the district court's denial of Cisneros' Requested Jury Instruction No. 15A was error that caused her egregious prejudice, because it allowed the government to prove the causation element on less evidence than what is absolutely required by the Commerce Clause and 18 U.S.C. § 2(b).

The "but for" standard for causation that resulted from the lack of proper instruction created federal jurisdiction by happenstance. The second vacated panel's conclusion that federal jurisdiction can be established by an act which contributes to a murder for hire scheme by happenstance is clearly erroneous in light of *Pereira* and all other cases – principally *Rewis v. United States*, 401 U.S. 808, 813 (1971),

which the magistrate and the district court ignored – asserting that the Commerce Clause would require more. *See* Motion To Vacate, USCA5 at 38-39 (noting that *Rewis* held that reading mere "foreseeability" into the parallel Travel Act violated Congressional intent by making it too easy for the government to establish the jurisdictional nexus); *id.* at USCA5 39-40, 46-47. The jury was greatly prejudiced by the district court's rejection of Cisneros' proposed instructions on causation, because "but for" causation of international travel or communication cannot be sufficient to establish the foreign commerce nexus for federal court jurisdiction.

Contrary to the magistrate's findings adopted by the district court, a reasonable jurist could conclude that there is no procedural default of the issues related to the Fifth Circuit's denial of the suggested causation instruction (in the vacated panel opinions), because trial counsel asked for and received a running objection. Such a reasonable jurist would be *the district court*, which stated *inter alia*, "Anything I do that is inconsistent with what you have filed on record, you need not object to. You will preserve your objection." 11R1496.[6] Counsel relied on the district court's representation.

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[6] It is ironic at best for the district court (Judge Vela) to grant Cisneros a running objection at trial and then, on review of her motion to vacate, for Judge Hanen to deny her relief and COA on the omission of the causation instruction by finding a procedural default **and** speculating that Cisneros might not

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B. The Required Relationship Instruction

The district court's conclusion that Cisneros' requested instructions on "furtherance" and causation are "not consistent with the law in the Fifth Circuit," App. ___, whether correct or not, is essentially an admission that Cisneros' requested instructions are consistent with the law in other circuits. USCA5 at 454. In fact, the district court's conclusion runs counter to Fifth Circuit precedent as well, thus supporting a grant of COA. The district court's adoption of the *Cisneros* panels' treatment of the instructions as a correct statement of law would be opposed by other reasonable jurists in this and other circuits, as noted by Cisneros in her motion to vacate and her objections to the magistrate's report:

> Subsections a and b at pages 30 to 32 of Cisneros' Motion To Vacate stated the following regarding the second vacated panel opinion, which had held that the statute required the foreign commerce to **"facilitate" the underlying offense or "make it easier"** and found that her requested instructions on the required relationship (i.e., Requested Instruction Nos. 12 as supplemented by her theory of the defense instruction, No. 14) **was incorrect because it used the term "in furtherance" of the murder-for-hire**

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have objected for a *strategic reason* (when Cisneros was obeying in good faith Judge Vela's promise to her that she did not need to make specific objections to each of his decisions on proposed instructions in order to preserve error).

scheme (as opposed to "facilitated"). 203 F.3d at 346.

The second vacated panel opinion clearly erred – it was "dead wrong" – in suggesting the existence of a meaningful legal difference between the terms "facilitate" and "furtherance" for interpretation of the Travel Act and murder-for-hire statutes. The Supreme Court and the Fifth Circuit have used the terms interchangeably in cases dealing with Travel Act prosecutions. *See, e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 247 (1972) ("furtherance"); *Rewis v. United States*, 401 U.S. 808, 813 (1971) ("furtherance"); *United States v. Presley*, 478 F.2d 163, 168 (5th Cir. 1973) ("furtherance"); *United States v. Roberson*, 6 F.3d 1088, 1094 (5th Cir. 1993) ("facilitate"). The use of the term "facilitate" in the cases cited by the second vacated panel opinion, 203 F.3d at 344 n.7, merely follows the statutory language in 18 U.S.C. § 1952. *See United States v. Perrin*, 580 F.2d 730, 736 (5th Cir. 1978) ("[I]t is enough that the . . . use of interstate facilities makes easier or facilitates the unlawful activity.").

* * *

The vacated second panel opinion expressly recognized a conflict between Cisneros' case and *United States v. Houlihan*, 92 F.3d 1271, 1292 (1st Cir. 1996), wherein the First Circuit "required the use of the facility in interstate commerce to be 'in furtherance' of the

underlying murder scheme." ***The second vacated panel opinion did not address the fact that Cisneros' trial counsel had specifically modeled their requested instruction (using "in furtherance") from a district court jury instruction given in a murder for hire case by United States District Judge Harry Lee Hudspeth.*** (*United States District Judge, Western District of Texas*; explanation added)

The second vacated panel's finding that the Fifth Circuit itself only requires a showing that the use of the facility "facilitated" the underlying crime, i.e., "made it easier," also is inconsistent with other Fifth Circuit opinions. *United States v. Presley*, 478 F.2d 163, 168 (5th Cir. 1973) (reversing district court's denial of motions to withdraw nolo contendere pleas following *Rewis*, on finding that facts had not been developed regarding the "extent and significance of the crossing of state lines to the furtherance of the operations of [an] illegal gambling casino"); *United States v. Gooding*, 473 F.2d 425, 427-28 (5th Cir. 1973) ("The Travel Act does not proscribe all interstate travel which may incidentally lead to a furthering of unlawful activity.") (citing *United States v. Hawthorne*, 356 F.2d 740 (4th Cir. 1966)).

Indeed, **even the en banc opinion in *Marek /Cisneros* twice uses the term "in furtherance"**. *See, e.g.*, 238 F.3d at 313 ("The Marek majority acknowledged *Cisneros* but reasoned

> that it was not binding because, **in furtherance** of her murder-for-hire scheme. . . .") and 238 F.3d at 314 ("A panel of this court concluded that a reasonable jury could have found that (1) the fortune teller had participated in international calls as Cisneros' agent, and (2) those calls were sufficiently connected to the murder to be **"in furtherance"** of that crime." (footnote omitted)) (explanation added).

Finally, it is also noteworthy that in the context of 18 U.S.C. § 924(c)(1) – possession of a firearm during the commission of a drug trafficking crime or a crime of violence – Fifth Circuit Pattern Jury Instruction No. 2.48 reflects the following:

> To prove the defendant possessed a firearm "in furtherance," the government must prove that the defendant possessed a firearm that furthers, advances, or helps forward the drug trafficking crime [crime of violence].

Thus, the term "in furtherance" is not meaningfully different than the term "facilitates" and the vacated second panel was clearly in error in concluding that the term "in furtherance" was not substantially correct (to the "proper" term, "facilitated"). The district court therefore erred in relying on a vacated panel opinion given the interchangeable use of the terms "in furtherance" and "facilitate" by this Court, the Fifth Circuit and other Courts of Appeals, COA should be granted.

For the same reasons that (1) there was a running objection and (2) the requested "required relationship" (or "furtherance") instructions (Requested Instructions 12 and 14) were substantially correct (including by the standards of the Supreme Court and the Fifth Circuit, as well as United States District Judge Hudspeth), a reasonable jurist surely could find that there was no procedural default in relation to those instructions or the lack of objection to the district court's omission to give *any* instructions on the "required relationship" or causation elements. Instead, the district court instructed the jury regarding the foreign nexus in a manner grossly different from Cisneros' Requested Instruction No. 12. The district court instructed the jury that:

> The Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce.

11R1516; 1R93; 12R1593-1594. As noted by the district court, Cisneros objected to everything that was inconsistent with her requested jury instructions. 11R1499-1500, 1520-1521.

The above-quoted language allowed the jury to convict Cisneros if "somebody . . . involved" traveled in or used a facility of foreign commerce ***regardless of the activity's connection, if any, to the alleged murder for hire scheme***. **In fact, it affirmatively allowed the jury to convict even if the foreign**

commerce facilities were not used in connection with the murder for hire scheme.

During jury deliberations, jury note number 1 from the jury sought a definition of foreign commerce: "Jury aid stating law concerning foreign commerce of communication and travel." 12R1600-1602. The district court, over Cisneros' objection (and reurging of her previously Requested Instruction No. 12), instructed the jury that:

> "You are instructed that foreign commerce means from one country to another country. Further, if words are not legally defined for you, you are to give them their common meaning." *See* 12R1602-1607.

Accordingly, the jury was not instructed on whether the foreign commerce (Garza's telephone calls to Martinez from Mexico and/or the car crossing on March 2, 1993) was sufficiently related to the murder for hire scheme to justify a unanimous verdict as to this critical first element of the offense.

Both vacated panel opinions reflect that the requested instruction was **not** substantially accurate and therefore, properly denied by the district court. As noted above, under both vacated panel opinions, the proper language should have been whether the foreign commerce "**facilitated**" the murder for hire scheme, not whether the foreign commerce was "**in furtherance of**" the murder for hire scheme, even though the *en banc* opinion uses the term "in furtherance" of the murder for hire scheme on two occasions.

The interchangeable use of the terms "in furtherance" and "facilitates" by the Supreme Court, the Fifth Circuit, and the First Circuit demonstrates the debatability of Cisneros' COA issues.

Furthermore, the failure to request an appropriate instruction on the requirement that the foreign commerce be sufficiently related to the murder for hire scheme before the jury could find foreign commerce within the meaning of § 1958 fell below prevailing professional norms and was prejudicial to Cisneros. Trial counsel had a duty to request an appropriate jury instruction on this critical element of the offense. As reflected by trial counsel's final argument at 12R1561-1574, this was in fact the penultimate issue for the jury's consideration: whether the alleged calls from Garza to Martinez from Mexico or the car crossing was sufficiently related to the murder for hire scheme to justify a finding of guilt. There was no strategic reason for trial counsels' failure to request an appropriate instruction and there could have been no objectively reasonable reason to have failed to do so.[7]

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[7] *See e.g., Lawson v. Warden, Mansfield Correctional Institution*, 197 F. Supp. 1072, 1084-1090 (S.D. Ohio 2002) (finding it "inconceivable that a competent attorney would, for strategic reasons, fail to request a jury instruction on defendant's mental health, the crux of defendant's defense," *id.* at 1085, and the omission of an appropriate instruction "tantamount to failing to instruct a jury on the critical issue in the case, for instance telling a jury that it can find the defendant

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Whether viewed in the context of the denial of a meaningful appeal (First COA Issue), a denial of the right to have the jury convict Cisneros only upon proof and proper instruction of all of the elements of the offense (Second, Fourth and Fifth COA Issues), or in the context of ineffective assistance of counsel (Seventh and Eighth COA Issues), reasonable jurists could easily disagree with the magistrate, the district court and the Fifth Circuit that Cisneros' rights were adequately protected and that she had a fair trial on these penultimate components of the only element upon which her defense rested. *United States v. Gaudin*, 515 U.S. 506 (1995) in and of itself, justifies COA given the absence of appropriate proof, jury instructions and a jury finding on the two essential components of the first element of the offense.[8]

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guilty of an offense charged in the indictment without explaining the essential elements of that offense." *Id.* at 1087).

[8] *Lawson*, *supra* at 1087, noted the following:

> "There is a familiar adage that a jury is presumed to follow the instructions of law given by the court. **However, there is no maxim that, if there are no instructions on point, the jury will be presumed to have found its way to the correct decision or applied the correct legal standards, on which it had not been instructed, to reach a factually and legally sustainable verdict.**" (Emphasis added).

5. The Failure To Consider Authorities Justifying Expansion Of The Record And An Evidentiary Hearing.

The district court adopted the magistrate's recommendation refusing expansion of the record[9] and an evidentiary hearing. This was appropriate only if "the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980); *Blackledge v. Allison*, 431 U.S. 63, 82 n. 25 (1977) ("opposing affidavits present a credibility question which should be resolved at an evidentiary

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[9] Cisneros had sought discovery and expansion of the record on her claims that the critical government witness, Garza, had significantly modified his testimony at trial (from his prior sworn statements and statements to the FBI) and claimed, for the first time, that his calls from Mexico had not been made collect to Martinez, but rather had been made from pay telephones in Mexico. While Cisneros cross-examined Garza about this change in testimony, and even adduced testimony from an FBI Agent to whom Garza had claimed, no two occasions, to have always called Martinez collect from Mexico, Cisneros sought via discovery to explore how the government had procured this rather important significant modification, since Martinez's telephone records had shown a total absence of collect calls to her from Mexico. The Magistrate Judge denied discovery and expansion of the record on the basis that Cisneros had cross-examined Garza at trial, App. 157-160, and the district court upheld that ruling without any additional rationale. App. 155. Cisneros' position was that expansion of the record was necessary to develop the facts and circumstances surrounding Garza's significant modification of his story since it occurred while he was on the witness stand as the government's final witness in its case in chief.

hearing"); *Machibroda v. United States,* 368 U.S. 487 (1962); *Herman v. Claudy*, 350 U.S. 116, 123 (1956) (requiring evidentiary hearing even when petitioner's allegations were contradicted by affidavit from the government). The record belies that conclusion, and reasonable jurists could resolve this issue differently from the district court. Indeed, "[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

Cisneros' suppression and ineffective assistance of counsel claims (embodied within the Sixth through Ninth COA Issues) made specific allegations, based upon clear record evidence, that deserved further development:

> [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

Harris, 394 U.S. at 300. *See also United States v. Edwards*, 442 F.3d 258, 268 n. 10 (5th Cir. 2006) (quoting *Johnson v. Scott*, 68 F.3d 106, 112 (5th Cir. 1995)). There is nothing speculative nor inconcrete about what she alleged. *Id.* (quoting *Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir. 1989)). Reasonable jurists could certainly debate whether Cisneros received

ineffective assistance of counsel and/or should have been entitled to expansion of the record regarding her suppression claims.

The district court's conclusion that COA need not issue on the ineffective assistance of counsel claim relating to the jury instructions, despite trial counsel's concession that there was no strategy for failing to request a "proper" instruction (as the vacated panel opinions had defined a "proper" instruction) and without holding an evidentiary hearing also conflicts with this Court's opinions in *Blackledge v. Allison*, 431 U.S. 63, 82 n. 25 (1977) ("opposing affidavits present a credibility question which should be resolved at an evidentiary hearing") and *Herman v. Claudy*, 350 U.S. 116, 123 (1956) (requiring evidentiary hearing even when petitioner's allegations were contradicted by affidavit from the government). The district court concluded that the proper standard for deficient performance was whether the omissions "could have been" strategic, App. 5-6, and totally discounted the sworn concessions of trial counsel, without having been able to judge counsel's credibility. App. 5. Furthermore, the district court's conclusion of an absence of prejudice associated with that deficient performance, App. 7, overlooked the fact that no instruction was submitted to the jury requiring it to find that the foreign commerce was in any manner related to the murder for hire scheme, thus diluting the government's burden of proof on the critical jurisdictional issue, as explained above.

If the COA process is to meaningfully ensure plenary review by the Courts of Appeals of non-frivolous claims of constitutional violations, then this Court should exercise its supervisory power, grant certiorari and either issue COA as to Cisneros' claims or remand the case to the Fifth Circuit for further consideration of Cisneros' COA. Although a petition for writ of certiorari seeking review of the denial of COA "has an objectively low chance of being granted," *Gonzalez v. Crosby*, 545 U.S. 524, 544 n. 7 (2005) (Stevens, J., dissenting), the Fifth Circuit's denial of COA is inconsistent and compatible with the standards governing the issuance of COA and represents yet another inappropriate denial of COA by the Fifth Circuit. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Banks v. Dretke*, 540 U.S. 668 (2004).

PRAYER FOR RELIEF

Cisneros respectfully prays that this Court grant certiorari and COA on her claims.

Respectfully submitted,

DAVID L. BOTSFORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-41686
USDC No. 1:02-CV-191
USDC No. 1:92-CR-124-1

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

DORA GARCIA CISNEROS

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

(Filed May 28, 2008)

ORDER:

Federal prisoner Dora Garcia Cisneros was convicted in 1998 of the federal offense of "murder for hire," in violation of 18 U.S.C. § 1958. She now seeks a certificate of appealability (COA) to appeal the denial of her 28 U.S.C. § 2255 motion challenging that conviction.

A COA may issue only if Cisneros "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court

has denied relief on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court has denied relief on the merits, the prisoner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

Cisneros's first four claims in the COA application concern the propriety of this court's second panel decision in her direct appeal and this court's subsequent en banc decision affirming her conviction. She argues that (1) she was denied due process and meaningful appellate review because the en banc court did not expressly reinstate portions of the second panel decision, (2) the second panel decision incorrectly resolved her sufficiency-of-the-evidence claim, (3) the second panel decision erroneously held that her requested jury instruction on limitations was not necessary, and (4) the second panel decision incorrectly decided issues involving the type of causation necessary under § 1958 and the district court's denial of her requested jury instructions.

Cisneros also argues that the district court erroneously found procedurally barred her claims that (5) the jury was not instructed on the causation and "furtherance" elements of the offense and (6) the

Government violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), when presenting a witness whose testimony differed from his pretrial statements. Cisneros further argues that (7) trial counsel rendered ineffective assistance, including failing to adequately cross-examine witnesses to show a lack of jurisdictional nexus from the telephone calls and failing to request proper jury instructions, (8) appellate counsel rendered ineffective assistance, and (9) the district court abused its discretion by denying her motion for discovery and denying an evidentiary hearing.

Cisneros fails to show that reasonable jurists would disagree with the district court's resolution of her claims or that her issues deserve encouragement to proceed further. *See Slack,* 529 U.S. at 484. Accordingly, the request for a COA is DENIED.

/s/ Thomas M. Reavley
THOMAS M. REAVLEY
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
—BROWNSVILLE DIVISION—

UNITED STATES OF AMERICA	§	
	§	
	§	CIVIL NO. B-02-191
v.	§	
	§	
DORA CISNEROS	§	

ORDER

The Magistrate Judge's Report and Recommendation of April 4, 2007 (Doc. No. 28), is hereby **ADOPTED** and Petitioner's Application for a Certificate of Appealability (Doc. No. 26) is **DENIED.** Although the Report and Recommendation sufficiently addresses issues one through six, eight and nine, the Court writes to expound on issue seven in light of Dora Cisneros' ("Cisneros") Objections (Doc. No. 29).

The Seventh Certificate of Appealability Issue is ineffective assistance of trial counsel. This Court previously adopted the Magistrate Judge's Report and Recommendation that Cisneros' petition be denied because the alleged ineffective assistance of trial counsel involved acts/omissions that were tactical or strategic decisions, which fall into the wide range of objectively reasonable professional assistance.

The *Strickland* test involves a performance component as well as a prejudice component. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Cisneros argues that the performance prong of the *Strickland* test is met because her attorney has admitted that "*no strategy* was involved in their failure to specifically object to this Court's denial of the causation and jurisdictional nexus instructions 'counteract' the *Strickland* presumption." (Doc. No. 29 at 15) (emphasis original).

Cisneros notes that "[n]o court owes deference to any judgment made by counsel that 'no reasonable trial counsel would have engaged in." (Doc. No. 26) (citing *Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992)). Cisneros misses the point of the Magistrate Judge's Report and Recommendation. The instant case presents a situation where the acts/omissions complained of *could* have been based upon a strategic decision, which very well may have been the best decision under the circumstances. The fact that trial counsel may be willing to state, after the fact, that there was no strategic decision involved does not change the fact that in this case the conduct falls within the range of reasonable performance. If a petitioner could overcome *Strickland's* performance prong by merely alleging the mental inner workings of their attorney were not strategic, but the result of a "non-strategic" decision, the performance prong of *Strickland* would be rendered meaningless. Thus, counsel's willingness to state, after an adverse result, that a certain decision was not strategic does not change the fact that the decision would have comported with an acceptable standard of conduct regardless of whether it was the result of trial strategy.

Furthermore, a Court is not bound by an attorney's later comments on whether certain decisions were strategic in ruling on a Certificate of Appealability. *United States v. Battle,* 291 F. Supp. 2d 1367, 1382 (N.D. Ga. 2003).

The true question of whether a decision by counsel was appropriate under *Strickland* is whether it "could have been" a strategic decision. *See, e.g., Neville v. Dretke,* 423 F.3d 474, 483 (5th Cir. 2005). That is, regardless of whether the decisions of Cisneros's counsel were truly strategic, the acts/omissions did not fall below an objective standard of reasonableness under prevailing professional norms. There is no evidence that counsel's performance was not reasonable.

> That trial counsel have expressed vague and subjective opinions that their investigation was insufficient in certain respects or that it never occurred to them to investigate certain areas or that they were disorganized is entitled to little weight. Objectively speaking, the quality and breadth of the investigation conducted by trial counsel in this case so easily satisfies the *Strickland* test that it cannot be said that it would be debatable among jurists of reason whether Defendant's counsel conducted a competent investigation.

Battle, 291 F. Supp. 2d at 1367. Likewise, here the record is replete with counsels' efforts on Cisneros' behalf such that it cannot be debated among reasonable jurists that their performance was not competent.

"Deficient performance is determined by examining whether the challenged representation fell below an objective standard of reasonableness under prevailing professional norms." *Neville,* 423 F.3d at 482 (citing *Rampilla v. Beard*, 545 U.S. 374 (2005)). Counsel clearly exceeded this standard of reasonableness. Counsel suggest that we are bound by their subjective representation of ineffectiveness, but the Fifth Circuit has, in the past, found effectiveness in the face of sworn affidavits. *See, e.g., Glass v. Blackburn,* 791 F.2d 1165, 1170 (5th Cir. 1986).

Finally, even if Cisneros could meet the performance prong of *Strickland,* the evidence is certainly insufficient to show there was prejudice. *See id.* at 1170-71 (holding that petitioner failed to meet the prejudice prong without deciding whether affidavits of trial counsel stating that their failure to call potential witnesses was not the result of a strategic decision met the performance prong).

For the reasons stated above and for the many reasons set out in the Report and Recommendations, the Court agrees with the conclusion of the Magistrate Judge and hereby denies Cisneros' Application for Certificate of Appealability (Doc. No. 26).

Signed this 19th day of June, 2007.

/s/ Andrew Hanen
Andrew S. Hanen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
— BROWNSVILLE DIVISION —

DORA CISNEROS, Petitioner,	§	
	§	CRIMINAL ACTION
VS.	§	NO. B-98-124
	§	CIVIL ACTION
UNITED STATES OF AMERICA,	§	NO. B-02-191
	§	
Respondent.	§	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pending before the court is Petitioner's Application for Certificate of Appealability ("COA"). For the reasons stated below, it is recommended that the COA be denied on all issues.

I. Background

Cisneros ("Petitioner") was convicted of capital murder in the 357th Judicial District Court, Cameron County, Texas, Criminal Cause No. 93-CR-1515-E, and was sentenced to life imprisonment. Cisneros appealed the state conviction and on January 25, 1996, the Texas Appeals Court reversed her conviction. *Cisneros v. State*, 915 S.W.2d 217 (Tex.App. – Corpus Christi), *pet. ref'd.*, 935 S.W.2d 789 (Tex.Crim.App. 1996).

On February 23, 1998, Cisneros was indicted for the federal offense of "murder for hire" in violation of

18 U.S.C. § 1958, Criminal Cause No. B-98-124, in the United States District Court for the Southern District of Texas. On May 12, 1998, after a jury trial, Cisneros was convicted and subsequently sentenced to life imprisonment. Cisneros appealed and the United States Court of Appeals for the Fifth Circuit affirmed the conviction in a published panel opinion. *United States v. Cisneros,* 194 F.3d 696 (5th Cir. 1999). On February 3, 2000, this opinion was vacated and a new panel opinion was issued, affirming the conviction. *United States v. Cisneros,* 203 F.3d 333 (5th Cir. 2000). Then the Fifth Circuit, on its own motion, granted rehearing *en banc* and consolidated the case with *United States v. Marek,* 198 F.3d 532 (5th Cir. 1999). On January 4, 2001, the *en banc* court affirmed Cisneros' conviction without additional elaboration on issues presented in the panel opinion. Cisneros moved for an additional rehearing of the *en banc* opinion. Cisneros' petition for re-hearing was denied. The Supreme Court denied Cisneros' petition for writ of certiorari on October 1, 2001. *Garcia Cisneros v. United States,* 534 U.S. 813, 122 S.Ct. 37 (2001).

On September 30, 2002, Petitioner filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 in the above styled civil case. On October 20, 2005, the undersigned magistrate judge recommended that the district court deny relief (Docket No. 18). On September 28, 2006, the district court issued a Memorandum Opinion and Order denying Petitioner's relief and dismissing the case (Docket No. 22). Petitioner filed a

Notice of Appeal on November 21, 2006 (Docket No. 23). On February 7, 2207, Petitioner filed an Application for COA (Docket No. 26).

II. Substantial Showing of Denial of a Constitutional Right

Petitioner has raised nine issues which she believes are debatable among reasonable jurists and upon which a COA should issue. It is important to note that, Petitioner, in her first four issues, is asking this Court to determine whether reasonable jurists would find the Fifth Circuit's rulings (regarding her claims of error on appeal from her criminal conviction) debatable. Petitioner is apparently confused about what is required for a COA. The correct inquiry is whether reasonable jurists would find the district court's assessment of her constitutional claims (presented in her § 2255 motion) debatable. As set forth in her application for COA, Petitioner presents the following issues:

> Issue 1: Cisneros was denied her right to due process and a meaningful appeal by the Fifth Circuit's failure to restore those parts of its second panel decision not consistent with its holding in *Marek*;
>
> Issue 2: Evidence upon which Cisneros was convicted was legally insufficient, in violation of her right to due process under the Fifth Amendment (a reasonable jurist could conclude that the Fifth Circuit's finding of

sufficiency in the phone calls' formation of a jurisdictional nexus is in error);

Issue 3: The second *Cisneros* panel erred in denying Cisneros' requested instruction on the statute of limitations;

Issue 4: A reasonable jurist could find that the alleged jurisdictional nexus had an insufficient relationship to the alleged murder for hire scheme to satisfy the jurisdictional element (the Fifth Circuit erred in finding that "but for" causation was the correct standard and that there is a meaningful difference between the terms "facilitate" and "in furtherance");

Issue 5: Cisneros was denied her Fifth and Sixth Amendment rights to due process, a jury trial, and a reliable jury verdict because the jury was not instructed on "causation" and that foreign commerce had to "facilitate" or "be in furtherance" of the alleged murder for hire scheme, two essential components of the offense;

Issue 6: Cisneros was denied her right to due process by the prosecution's nondisclosure of the sequence of events surrounding Daniel Garza's gross modification of his story and by the prosecution's use of Daniel Garza's false testimony and creation of a false impression for the jury utilizing that testimony;

Issue 7: Cisneros was denied her right to ineffective assistance of trial counsel in violation of the Sixth Amendment;

Issue 8: Cisneros was denied her right to *effective assistance of appellate counsel in* violation of the Sixth Amendment;

Issue 9: This Court abused its discretion in denying Cisneros' request for expansion of the record through discovery and an evidentiary hearing.

A COA may issue if the Petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" requires the applicant to demonstrate that the issue are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the question is adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003); *Hicks v. Johnson,* 186 F.3d 634, 636 (5th Cir. 1999). Thus, the question for this Court is the debatability of the underlying constitutional claim, not the resolution of that debate. *Miller-El*, 537 U.S. at 342. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has granted and the case has received full consideration, that the petitioner will not prevail." *Id.* at 338.

Where a district court has rejected the constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional

claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

COA Issue 1

The *En Banc* Fifth Circuit's Failure to Reinstate Parts of the Panel Opinion

Petitioner makes a similar argument in her motion to vacate. *See Motion to Vacate,* Docket No. 1, pp. 21-22. Petitioner argues that a reasonable jurist could find that the *en banc* Fifth Circuit's failure to reinstate the parts of the panel decision which dealt with issues other than the one(s) chosen for *en banc* review, deprived Cisneros of a judgement on those issues which could have been reviewable by the Supreme Court on certiorari, in violation her Fifth Amendment due process rights. Petitioner reasons that she was left without any appellate decision on the principal issues in her case and that the deprivation of an appellate decision essentially foreclosed review by the Supreme Court on those issues. Petitioner contends that because the second panel opinion

was vacated, there was no review of the issues on the merits.

Petitioner raised this claim in her § 2255 motion. The undersigned magistrate judge recommended that the claim be denied and the district judge adopted the recommendation, finding that Petitioner did not demonstrate a due process violation because the failure of the *en banc* court to reinstate portions of the vacated panel opinions did not deny her meaningful review. However, this Court notes that Petitioner's claims fail for another reason.

Section 2255 motions are reserved for constitutional errors that occurred at trial and at sentencing. There is no legal authority which suggests that a petitioner can raise, in district court, constitutional errors allegedly made at the appellate level, after trial and sentencing. The legal precedent is in fact, to the contrary. The few courts which have addressed this issue have clearly found that actions of the appellate courts are not properly reviewable in a motion to vacate. *See U.S. v. Sanders,* 142 F.Supp. 638, 641 (D.C.Md. 1956) ("This court cannot properly vacate a sentence imposed here and affirmed by the Court of Appeals for any alleged or suggested error of the Court of Appeals."); *Vega v. U.S.,* 261 F.Supp.2d 175, 178 (E.D.N.Y.,2003) ("[Petitioner] does not allege nor prove that the Second Circuit's denial of his motion for re-argument implicates the legality of his sentence. Thus, it is not a proper claim for a Section 2255 motion."). It is clear that § 2255 motions are reserved for federal prisoners challenging the legality

of the imposition of a sentence. Therefore, Petitioner's § 2255 claims regarding any alleged errors by the *en banc* Fifth Circuit are not properly presented in a motion to vacate. Petitioner's burden in requesting a COA is to show that the district court's assessment of her constitutional claims are debatable by reasonable jurists. Petitioner has not done this. The case law is clear with respect to which claims are cognizable in a motion to vacate. Alleged errors by the appellate court are not. Petitioner has failed to show that reasonable jurists would find this issue debatable. *Slack,* 529 U.S. at 484.

Aside from the fact that Petitioner's claims, regarding the actions of the appellate court, cannot be raised in a motion to vacate, they are without merit. Due process does not guarantee the right to appeal. There is no constitutional right to appeal; the right to appeal is a statutory one. *See Abney v. United States,* 431 U.S. 651, 656, 97 S.Ct. 2034, 2038-39 (1977); *United States v. Melancon,* 972 F.2d 566, 567 (5th Cir.1992); 8 U.S.C. § 3742. However, because Congress created the statutory mechanism by which to appeal a criminal judgment of conviction, due process entitles a defendant to "meaningful appellate review" by which litigants are entitled to have all issues fully considered and ruled on by a panel of the *Court of Appeals. See U.S. v. Pajooh,* 143 F.3d 203, 204 (5th Cir. 1998) (emphasis added). Meaningful review does not equate to a full written opinion. *Id.* The review process is distinguishable from the manner in which the Court announces its decision. *Id.* Even though an

appeals court does not expressly discuss, in written form, a defendant's point of error, it nonetheless receives full consideration and a ruling where the court makes a finding of "no reversible error" and affirms the defendant's conviction and sentence. *See U.S. v. Garza,* 165 F.3d 312, 314 (5th Cir. 1999).

In Petitioner's case, she received meaningful review by a court of appeals in the first and second panel opinions. Although they were vacated, Petitioner provides no legal authority for the proposition that the vacatur instantly eliminated the meaningful review that her issues had already received. Nor does Petitioner provide authority for her argument that the vacatur prevented the Supreme Court from meaningfully reviewing those issues, had certiorari been granted.

The *en banc* court found that there was no reversible error and affirmed Cisneros conviction and sentence. *See Marek,* 238 F.3d at 323. Therefore, Petitioner received full consideration and a ruling. *See Garza* at 314. Contrary to Petitioner's argument, she did receive an appellate decision and a meaningful review by a court of appeals. That is all that is required by the Fifth Amendment's due process clause. *Pajooh,* 143 F.3d at 205. Petitioner has not shown that "meaningful review," under the due process clause, requires an *en banc* court to reinstate portions of a vacated opinion, when the underlying conviction is affirmed and there is no finding of error.

It is not dispositive that the Fifth Circuit has, on past numerous occasions, reinstated portions of vacated panel opinions. A pervasive custom, habit or practice does not create a due process right. As so aptly noted by the district judge in his memorandum opinion, "Cisneros was not deprived of the opportunity to have all her claims raised before the Supreme Court, merely by the failure to write on them by the Fifth Circuit *en banc*. She was free to raise these issues in her petition for certiorari and, if granted, could have had each reviewed despite the Fifth Circuit's failure to address these in writing in the *en banc* opinion." *Memorandum Opinion and Order,* Docket No. 22, p. 18. Petitioner has failed to present any authority for her contention that failure to reinstate certain parts of a vacated panel decision forecloses review by the Supreme Court and amounts to a lack of meaningful review in violation of due process.

In order to be entitled to a COA on this issue, Petitioner must show that the district court's assessment of her constitutional claim is debatable by reasonable jurists. Petitioner has not done this. The case law is clear with respect to what constitutes meaningful review. Petitioner received meaningful review by the Fifth Circuit on three separate occasions. Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to show that reasonable jurists would find this Court's assessment of her constitutional claims debatable. *Slack,* 529

U.S. at 484. Petitioner is not entitled to a COA on this issue.

COA Issue 2

Second *Cisneros* Panel Opinion – Jurisdictional Nexus and the Limitations Period

Petitioner raised a similar argument in her motion to vacate. *See Motion to Vacate,* Docket No. 1, pp.24-42 (Claims for Relief Nos. 1-5.). In her Application for COA, Cisneros states that "[a] reasonable jurist could conclude that this Court's [Fifth Circuit's] finding of sufficiency in the phone calls' formation of a jurisdiction nexus is in error." *Application for COA,* Docket No. 26, p. 7. "Reasonable jurists clearly would dispute the Panel's characterization of when a crime under 18 U.S.C. § 1958 is 'complete'." *Id.* at 8. "The second vacated panel opinion conflicts with other circuit court decisions that find the crime to be complete with the use of interstate commerce facilities." *Id.* at 9.

Petitioner raised this claim in her § 2255 motion asking the district court to collaterally review an alleged error by the Fifth Circuit. The undersigned magistrate judge recommended that the claim be denied and the district judge adopted the recommendation, finding that Petitioner's constitutional claim was without merit. The district court found that Petitioner had received "meaningful review", as required by the due process clause as she "has had more than twenty-four appellate judges (three of

whom considered her case on three separate occasions), two District Judges, and one United States Magistrate Judge consider the merits of her case. Both panel decisions considered all her points of error, and all appellate judges considered these points when they addressed her motions for rehearing and petition for writ of certiorari." *Memorandum Opinion and Order,* Docket No. 22, p. 18.

In order to be entitled to a COA on this issue, Petitioner must show that the district court's assessment of her constitutional claim is debatable by reasonable jurists. Petitioner has not done this. Petitioner, incorrectly asks this Court to review the findings of the Fifth Circuit and determine whether reasonable jurists would find its decision debatable. The only pertinent inquiry is whether reasonable jurists would find the district court's assessment of Petitioner's due process claim debatable. This Court finds that reasonable jurists would not. The case law is clear with respect to what constitutes meaningful review and Petitioner has failed to show that she did not receive meaningful review of her claims of error at the appellate level. Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to show that reasonable jurists would find this Court's assessment of her constitutional claims debatable. *Slack,* 529 U.S. at 484. Petitioner is not entitled to a COA on this issue.

COA Issue 3

Second *Cisneros* Panel Opinion – Statute of Limitations

Petitioner raised a similar argument in her motion to vacate. *See Motion to Vacate,* Docket No. 1, pp.24-42. Petitioner argues that the jury was not properly instructed on the statute of limitations and that "[r]easonable jurists certainly could find that the second vacated panel opinion clearly erred by holding that Cisneros' Requested Instruction 15 [on the statute of limitations] was not necessary." *Application for COA,* Docket No. 26, p. 11. As set forth at length above, any claimed error made by the appellate court is not reviewable in a motion to vacate. *See Sanders,* 142 F.Supp. at 641; *Vega*, 261 F.Supp.2d at 178. Notwithstanding, Petitioner raised this issue in her motion to vacate. The district court properly denied relief finding that Petitioner had received meaningful review of her claims as required by the due process clause. Petitioner, in her instant argument, again misinterprets the requirements for granting a COA. Petitioner is required to show that reasonable jurists would find the district court's assessment of her § 2255 claim debatable (i.e. whether the district court's determination that Cisneros received meaningful review is debatable). Petitioner, instead asks this Court to entertain the issue of whether reasonable jurists would find that the second *Cisneros* panel erred in its appellate decision regarding Required Instruction No. 15, Petitioner has gone to great

lengths, in a futile attempt, to explain why the second *Cisneros* panel was wrong in its analysis.

The appropriate focus, in determining whether a COA should issue, is on the constitutional assessment made by the district court. In her motion to vacate, Petitioner offered no legal precedent and the district court found none, for the authority to collaterally review any alleged errors made by the Fifth Circuit. Further, the district court thoroughly analyzed the guarantees provided by the due process clause and found that Cisneros had clearly received meaningful review by the Fifth Circuit which was not extinguished by the *en banc* court's vacatur of the panel opinions. The district court further found that any alleged failure of the Fifth Circuit did not foreclose possible review by the Supreme Court, had certiorari been granted. Petitioner's subjective belief that the Fifth Circuit erred in its ruling in the second panel decision does not amount to a denial of a constitutional right.

Petitioner has not come forward with any new authority for the proposition that the district court was wrong in its due process analysis or that a district court has authority to review (in a motion to vacate) an action or decision of the Fifth Circuit. A motion to vacate is used to raise constitutional errors made at trial or sentencing, which are subject to collateral attack. Petitioner inappropriately re-argues an issue that was not even properly raised in her motion to vacate, much less one upon which reasonable jurists would debate.

Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to show that reasonable jurists would find this Court's assessment of her constitutional claim debatable. *Slack*, 529 U.S. at 484. Petitioner has not presented any legal authority for her argument and reasonable jurists would not disagree regarding the utter lack of arguable merit underlying Petitioner's claim. Petitioner is not entitled to a COA on this issue.

COA Issue 4

Second *Cisneros* Panel Opinion – Causation and Furtherance

Petitioner raised a similar argument in her motion to vacate. *See Motion to Vacate,* Docket No. 1, pp. 24-42. Petitioner states that a "reasonable jurist could find that the alleged jurisdictional nexus. . . . , had an insufficient relationship to the alleged murder for hire scheme to satisfy the jurisdictional element." *Application for COA,* Docket No. 26, p. 11-12. Petitioner argues that the second *Cisneros* panel erred in finding that "but for" causation was the standard and that "[t]he second *Cisneros* panel opinion concluded that *United States v. Edelman*, 873 F.2d 791 (5th Cir. 1989) governed and only required the Government to prove 'simple but for causation rather than forseeability' in order to establish. . . . causation" *Id.* at 12. "[A] reasonable jurist could find that this understanding of causation misapplies a conspiracy case (*Edelman*)

to a straightforward murder-for-hire case and is prohibited by *Rewis v. United States,* 401 U.S. 808 (1971)." *Id.* "A reasonable jurist rejecting 'but for' causation. . . . could find that, because the Government failed to prove beyond a reasonable doubt that Cisneros intentionally or knowing caused the travel or use of interstate facility, the evidence against her is legally insufficient." *Id.* at 12.

Petitioner is arguing that the Fifth Circuit decided certain issues on appeal incorrectly. First, she takes issue with the second *Cisneros* panel's finding regarding the type of causation required. Second, she attacks the second *Cisernos* panel's rejection of Cisneros' Requested Instructions Nos. 14[1] and 15A[2]

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[1] Cisneros' Requested Instruction No. 14 was a "theory of defense" instruction which stated: "The defendant's position is that she is not guilty of the offense of murder-for-hire. Her position is that she did not agree with Maria Martinez or anyone else, for that matter, to pay anyone to kill Albert Joseph 'Joey' Fischer, Jr. It is also her position that the government has not proven beyond a reasonable doubt either (A) that she **caused** Heriberto Pizana to travel from Mexico to Brownsville on March 2, 1993, in furtherance of the alleged murder-for-hire; and/or (B) that she caused Daniel Garza to use a facility of foreign commerce to call Maria Martinez in Brownsville from San Fernando and Matamoros, Tamaulipas, Mexico between November 1992 and February 1993, **in furtherance** of the alleged murder-for-hire.

[2] Cisneros' Requested Instruction No. 15A was the "causation" instruction which stated: "A person 'causes' another to travel in foreign commerce or to use facilities in foreign commerce if he does an act with knowledge that the foreign travel or use of facilities in foreign commerce will follow in the ordinary course of business, or where such foreign travel or use of

(Continued on following page)

regarding her theory of defense and causation, respectively. The panel found that Petitioner's proffered instructions were not accurate, noting that the "in furtherance" language was not correct. Petitioner argues that "a reasonable jurist could conclude that the *Cisneros* panel was wrong to suggest any meaningful difference between the terms 'facilitate' and 'furtherance' for the interpretation of the Travel Act and murder-for-hire statutes." *Id.* at 14. Petitioner concludes that "a reasonable jurist rejecting 'but for' causation in the instant context could find that, because the Government failed to prove beyond a reasonable doubt that the travel or use of interstate facility 'furthered' the crime of murder-for-hire, the evidence again Cisneros is legally insufficient." *Id.* at 15.

Again, Petitioner has not made the required showing for issuance of a COA. Petitioner incorrectly asks this Court to determine whether reasonable jurists could find that the second *Cisneros* panel erred in holding that "but for" causation was the standard and that there was a difference between the terms "facilitate" and "in furtherance". However, the correct inquiry, is whether reasonable jurists could find the district court's assessment of this constitutional claim debatable. As previously noted, the district court found that there was no due process violation as

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facilities in foreign commerce can reasonably be foreseen, even though not actually intended."

Petitioner received a meaningful review of her issues on appeal. In the present COA application, Petitioner fails to present any authority which shows that reasonable jurists would find the district court's assessment debatable.

Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to show that reasonable jurists would find this Court's assessment of her constitutional claim debatable. *Slack*, 529 U.S. at 484. Petitioner has not presented any legal authority for her argument and reasonable jurists would not disagree regarding the utter lack of arguable merit underlying Petitioner's claim. Petitioner is not entitled to a COA on this issue.

COA Issue 5

The Causation and Required Relationship (Nexus) Instruction

In her Application for COA, Petitioner argues that she was denied due process of law under the Fifth Amendment and her right to trial by jury under the Sixth Amendment because the jury was not instructed on: (1) causation; and (2) the required relationship between the foreign commerce and the murder-for-hire scheme. In the motion to vacate, the undersigned magistrate judge recommended denial of this claim on procedural grounds, as Petitioner failed to object to the omission of the causation and required relationship instructions, failing to preserve error for

appellate review. The undersigned magistrate judge found that Petitioner failed to demonstrate the requisite "cause and prejudice" which would allow collateral review. *See United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593 (1982).

In adopting the magistrate's recommendation, the district court noted that Petitioner failed to object to the lack of an instruction on the nexus requirement and instead only objected to the refusal of the trial court to use her proposed "furtherance" instruction. *Memorandum Opinion and Order,* Docket No. 22, p. 14-15. The district court noted, with respect to the causation instruction, that when the trial court refused to include Cisneros' instruction, as it was not a correct statement of the law, Cisneros did not offer an alternative instruction or object to the fact that there was no definition in the jury instructions. *Memorandum Opinion and Order,* Docket No. 22, p. 15. The district court concluded that Cisneros "has shown no error and certainly has not shown the requisite cause and prejudice which she must to prevail in this action." *Id.*

Petitioner argues that a "reasonable jurist could disagree with this Court that Cisneros gave an incorrect statement of the law [for Requested Instruction No. 14 (causation)]." Petitioner, in addressing the procedural default, states that "contrary to the Magistrate's findings, a reasonable jurist could conclude that there is no procedural default . . . because trial counsel asked for and received a running objection." *Application for COA,* Docket No. 26, p. 18.

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). In this case, the district court found that Petitioner's claim was procedurally barred and that she failed to demonstrate the requisite cause and prejudice. Therefore, Petitioner must show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

A review of Petitioner's motion to vacate reveals that she did not present any arguments regarding the cause for her failure to object to the omission of the "causation" and "nexus" definitions and any resulting prejudice. Petitioner instead argues that she preserved error via her running objection. This argument is too little, too late, A review of the Fifth Circuit panel opinions belies Petitioner's assertion. The appellate court did not review this claim of error. The magistrate and the district judge found that there was no objection and that the error was not preserved for review. The district court noted that "Federal Rule of Civil Procedure 51 requires that a party objecting to a jury instruction or the failure to give an instruction state 'distinctly the matter objected to and the

grounds for the objection.' FED.R.CIV.P. 51." *Memorandum Opinion and Order,* Docket No. 22, p. 15.

For a COA to issue on this claim Petitioner is required to show that the district court's procedural ruling is debatable. This would necessarily require Petitoiner to show that she demonstrated the requisite cause and prejudice and the district court's assessment was wrong or debatable. This she has not done. Petitioner is also required to show that her petition states a valid claim of the denial of a constitutional right. Petitioner has failed to make this showing.

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without due process of law and the Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. *See United States v, Gaudin,* 515 U.S. 506, 509-510, 115 S.Ct. 2310, 2313-2314 (1995). These provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Id.* The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970).

The murder-for-hire statute, 18 U.S.C. § 1958, consists of three elements: (1) traveling or causing

another to travel in interstate or foreign commerce, or using or causing another to use the mail or other facility of interstate or foreign commerce; (2) with intent that a murder be committed in violation of the laws of any State or the United States; and (3) as consideration for the receipt of pecuniary value. *United States v. Sharpe,* 193 F.3d 852, 864 n.6 (5th Cir. 1999). The record shows that the jury was charged on all three of the above elements. The jury instructions mirrored the statutory language and referenced all three elements of the murder-for-hire statute, including causation. As both the panel and the *en banc* opinions found, the evidence was plainly sufficient to prove causation beyond a reasonable doubt.

The definition of causation submitted by Petitioner was properly refused as it was an incorrect statement of the law. The trial court was not required to correct a defective request. The lack of a definition of causation and the nexus did not violate Petitioner's due process rights. Petitioner must show that any alleged error in a jury charge, by itself, so infected the entire trial that the resulting conviction violates due process, not merely that the instruction is undesirable, erroneous, or even universally condemned. *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S.Ct. 1730, 1736 (1977). In this case, Petitioner's burden of demonstrating a constitutional violation is especially onerous because no erroneous definition was given. Petitioner's claim is based on the failure to give any explanation beyond the reading of the statutory

language itself of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law. *Id.* Petitioner has failed to demonstrate that the omitted definitions, by themselves, so infected the entire trial that her conviction violates due process. The district judge, in denying Petitioner's motion to vacate, noted that there may have been strategic reasons for counsel's failure to object to the omission of a causation definition, which could have possibly worked in her favor:

> Indeed, one can postulate many reasons for not objecting and insisting on the inclusion of a definition of cause. One strategic reason readily comes to mind. At the time Petitioner's own offered definition had been refused. That being the case, counsel could have assumed, with near certainty, that any definition the court would give would be less favorable considering her view of the case than the one they proposed. With no definition counsel would still have the latitude to argue that no cause existed and would not be harmed by a more restrict definition.

Memorandum Opinion and Order, Docket No. 22, p. 16, n. 7.

Petitioner's arguments are misguided. In her Application for COA, Petitioner argues that the definition of "causation" and "nexus" which she offered were substantially correct. Again, Petitioner misunderstands the COA requirement. The Fifth

Circuit already found that Petitioner's proffered definitions were not correct and were inconsistent with the law in the circuit. *Cisneros,* 203 F.3d at 346-47; *Cisneros,* 194 F.3d at 638-39. That page has turned. This court cannot, in a request for COA, review appellate rulings as Petitioner suggests. Petitioner's argument, i.e. that reasonable jurists could find that the definitions were substantially-correct, is completely irrelevant.

This Court's inquiry is limited. It cannot review and compare the Fifth Circuit's findings with those of reasonable jurists. It can only analyze whether the district court's procedural ruling is debatable or wrong, and whether her petition stated a valid claim of the denial of a constitutional right. The analysis above, as well as those set forth in the undersigned magistrate's recommendation and the district court's order, clearly show that Petitioner has failed to demonstrate a valid claim of the denial of a constitutional right. The omitted definitions did not amount to a denial of due process.

Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to show that reasonable jurists would find this Court's assessment of her constitutional claim debatable. *Slack,* 529 U.S. at 484. Petitioner has not presented any legal authority for her argument and reasonable jurists would not disagree regarding the utter lack of arguable merit underlying Petitioner's claim. Petitioner is not entitled to a COA on this issue.

Issue 6

Cisneros' *Giglio/Brady/Napue* Claim

Petitioner, in her motion to vacate, argued that the Government violated her due process rights by: (1) failing to disclose the sequence of events surrounding the modification of Daniel Garza's witness testimony; (2) using false testimony; and (3) suppressing impeachment evidence. The trial witness, Daniel Garza ("Garza"), was the client of Maria Martinez, the *curandera,* who Petitioner paid to find and hire the hit-men in the murder-for-hire scheme. Petitioner alleges that Garza initially stated, in FBI interviews, that his telephone calls (the jurisdictional nexus) with Maria Martinez were made in a time frame predating the murder-for-hire scheme and were made "collect".

However, at trial, Garza testified that he made pre-paid direct telephone calls from San Fernando, Mexico, in a time frame consistent with the murder-for-hire scheme. Petitioner alleges that "[t]here is no reason why Garza would modify his story about the calls without prompting by the Government to try to meet the jurisdictional requirement." *Application for* COA, Docket No. 26, p. 20. Petitioner argues that the Government failed to disclose exculpatory evidence and used perjured testimony in violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763 (1972), *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963) and *Napue v. Illinois,* 360 U.S. 264, 269-70, 79 S.Ct. 1173 (1959).

Petitioner, in her Application for COA, argues that "[a] reasonable jurist could find that the array of facts at pages 76-82 of [Cisneros'] Section 2255 Motion presents strong doubt about the credibility of the Government's key witness and the ethical nature of the Governments' case." *Application for COA,* Docket No. 26, pp. 20-21. Petitioner contends that "[g]iven the lack of a basis for jurisdiction in the car crossing, it is apparent that, if the jury disbelieved the credibility of Garza regarding the making of phone calls to Martinez from Mexico, the Government would have provided insufficient proof of the jurisdictional nexus, requiring an acquittal. *Id.* at 21.

The district court, in denying the motion to vacate, found that Petitioner failed to raise this issue on direct appeal and failed to demonstrate the requisite cause and prejudice needed to secure collateral review. The undersigned magistrate judge found that Petitioner failed to establish cause for the procedural default, as trial counsel was not ineffective and there was no objective external factor which impeded counsel's efforts to raise the issue on appeal. The undersigned magistrate judge also found that Petitioner failed to establish prejudice, as the jury was aware of Garza's inconsistent statements and could have relied on testimony from the other trial witnesses to find the required relationship or jurisdictional nexus (i.e. that a facility in foreign or interstate commerce was used or that there was travel in interstate or foreign commerce).

As this claim was denied by the district court on procedural grounds (failure to demonstrate "cause and prejudice"), Petitioner must demonstrate a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

Petitioner claims that the government failed to disclosed Garza's modification of his testimony. A *Brady* violation consists of three elements: (1) the evidence was suppressed; (2) the evidence was favorable to the accused (either exculpatory or impeaching); (3) evidence was material to guilt or punishment. *Jackson v. Johnson,* 194 F.3d 641, 648 (5th Cir. 1999). Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 649-50. A reasonable probability is the probability sufficient to undermine confidence in the outcome. *Id.*

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley,* 514 U.S. 419, 434-35, 115 S.Ct. 1555, 1566 (1995). The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's

conclusions, it is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id.*

Petitioner fails to meet the first and third elements of a *Brady* claim. First, Petitioner has not demonstrated that evidence was suppressed. The record shows that Garza told the FBI, during an interview, that he consistently made "collect" calls to Martinez. Subsequent to the FBI interviews, on February 18, 1998, defense counsel interviewed Garza, during which he stated that he did not recall making calls from Mexico. Approximately two months later, on April 20, 1998, the government filed its Bill of Particulars in which it stated that the "evidence in the case will show, in regards to use of telephone communications facilities in foreign commerce, that Daniel Garza used telephone facilities in San Fernando, Tamaulipas, Mexico, and in Matamoros, Tamaulipas, Mexico, to call Maria Martinez in Brownsville, Texas. . . .". *U.S. v. Cisneros,* Criminal Case No. B-98-124-1, Docket No. 59.

At trial, Garza testified on direct examination that there must have been a mistake regarding his prior interview statements about always calling Martinez "collect". Garza testified that he must have called "collect" only once. Whether Garza's mistake was due to a communication, translation, or memory error, it is of no import. Defense counsel knew about Garza's statements to the FBI and was aware that the government was going to present evidence of

phone calls from Mexico, as set forth in its Bill of Particulars. The government attempted to clarify on direct examination, the type and location of calls made to Martinez. It is not beyond the realm of possibility that Garza's initial statements to law enforcement and his eventual trial testimony differed for reasons other than coercion by the government to present perjured testimony. The defense knew that the government was going question Garza regarding calls made from Mexico, even though Garza had told defense counsel that he only made calls from Texas.

Petitioner also fails to meet the third element of a *Brady* claim, i.e. the evidence was "material" to guilt or punishment. The term "material" has a very specific meaning. Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The materiality inquiry focuses on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Kyles,* 514 U.S. at 434-35. The record provides strong support for the conclusion that had defense counsel cross examined Garza regarding the modification of his story, putting his credibility at issue, it would not have undermined confidence in the verdict. The government did defense counsel's job for him right at the outset. The government questioned Garza, on direct examination, about his prior inconsistent statements. The government brought to light the fact that Garza had made a prior inconsistent

statements to the FBI and questioned him regarding that modification. The government put Garza's credibility at issue and the jury was made aware of it. Defense counsel's failure to cross examine Garza regarding that modification was a strategic choice. In hindsight, the failure to cross examine may have had an adverse impact on the defense, but it cannot be corrected on collateral review by claiming that the government suppressed evidence.

Even if defense counsel had questioned Garza even more thoroughly regarding the change in testimony, Petitioner has not shown that the jury would have found his testimony about the direct calls from Mexico not credible, Although Maria Martinez testified that she believed that the calls she received from Garza were made from either San Antonio and Dallas and Garza testified about his inconsistent statements, the jury nonetheless believed Garza's testimony that he had also made direct calls from San Fernando, Mexico.

Petitioner is correct in her contention that a *Brady* claim may be based on suppressed evidence which would lead to the impeachment of a key witness. The duty to disclose evidence encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375 (1985). However, Petitioner must establish that the government "suppressed" this evidence and that it was "material" to guilt or punishment. Not every violation of that duty necessarily establishes that the outcome was unjust. *Strickler v. Greene,* 527

U.S. 263, 281, 119 S.Ct. 1936, 1948 (1999). Strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. *Id.*

Petitioner has not made this showing. It is true that evidence of Garza's change in his story was impeaching, but that is not all that is required to succeed on a *Brady* claim. When Brady evidence would have only a "cumulative" or marginal impact on the jury's credibility assessment, habeas relief is not in order because the evidence is not material. *Jackson v. Johnson,* 194 F.3d 641, 650 (5th Cir. 1999). *See also Pyles v. Johnson,* 136 F.3d 986, 999 (5th Cir.1998) (Brady evidence with "marginal negative impact on jury's credibility assessment" does not warrant habeas relief); *Westley v. Johnson*, 83 F.3d 714, 725 (5th Cir.1996) (*Brady* evidence that does not constitute "significant new evidence" does not warrant habeas relief); *Spence v. Johnson*, 80 F.3d 989, 995 (5th Cir. 1996) (*Brady* evidence that is "cumulative" does not warrant habeas relief); *Drew v. Collins*, 964 F.2d 411, 419-20 (5th Cir.1992) (Brady evidence with only "incremental impeachment value" does not warrant habeas relief).

The government impeached Garza on direct examination and questioned him about his prior statements. Garza's credibility was open to question. Additional evidence that Garza changed his story (in his interviews with the FBI, defense counsel, and the prosecution) would have only been cumulative. The

fact that the government impeached Garza and the jury still found that Garza made the international phone calls, in and of itself shows that the evidence was not "material" as defined in the relevant case law.

Petitioner also claims that the government elicited perjured testimony from Garza in violation of *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173 (1959). Petitioner alleges that the government knew Garza did not make any phone calls from Mexico, but somehow forced him to give false testimony to meet the jurisdictional nexus requirement. Petitioner offers no support for this conspiracy theory of manufactured evidence, other than the fact that Garza stated in his interview with defense counsel that he did not make any phone calls from Mexico. A review of the record reveals that there is no evidence of forced perjury. It is entirely likely, given Garza's frequent change in his story, that the statements he made to defense counsel were not credible.

Petitioner must show the following to obtain reversal of his conviction on the grounds that the government elicited false testimony: (1) the testimony was false, (2) the prosecution knew it was false, and (3) it was material. *United States v. Scott,* 48 F.3d 1389, 1394 (5th Cir. 1995), cert. denied, 516 U.S. 902, 116 S.Ct. 264 (1995). The false testimony is material if there is "any reasonable likelihood" that it could have "affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766 (1972). Petitioner has failed to show that Garza's

testimony was false and that the government knew it was false. Petitioner's blank assertion, that Garza's change in testimony itself is evidence of government wrongdoing, is not a sufficient showing under the law. Petitioner has failed to show a valid claim of the denial of a constitutional right under *Gigilo, Brady,* or *Napue.*

Finally, because the district court denied this claim based on procedural grounds, Petitioner must show that reasonable jurists would find the district court's procedural ruling debatable or wrong. The district court found that Petitioner had not demonstrated the requisite "cause and prejudice" needed to overcome the procedural default.

Petitioner argues that the "cause" for failing to raise the *Brady* claim on direct appeal was that she was unaware of the factual basis of the claim. The record belies this assertion. Since the trial, no new facts have come to light, upon which a *Brady* claim could be made. Defense counsel knew about Garza's interview statements with defense counsel and the FBI, as well as his trial testimony, and was aware that there were inconsistencies. Petitioner argues that "evidence of suppression is plainly demonstrated by the record of Garza's surprise switches in story . . . "[3]. If this is so, then Petitioner would have been able to raise a *Brady* claim at trial and on direct appeal, because the "switch in story" was known at

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[3] *Application for COA,* Docket No. 26, p. 20.

the time of the trial. Likewise, Petitioner fails to demonstrate prejudice, for the same reasons that the impeachment evidence was not "material" as it did not put the whole case in such a different light as to undermine confidence in the verdict. Petitioner has failed to show that reasonable jurists would find the district court's procedural ruling debatable or wrong. Petitioner is not entitled to COA on this issue.

Issue 7

Ineffective Assistance of Trial Counsel

In Petitioner's motion to vacate, she claimed ineffective assistance of trial counsel based on defense counsel's failure to: (1) object to the transcripts of Garza and Martinez's phone calls; (2) cross examine Martinez on the location of the phone calls; (3) emphasize Garza's inconsistent statements; (4) request a causation instruction; (5) request an instruction on the jurisdictional nexus. The undersigned magistrate judge found that counsel's alleged failure to make objections, adequately cross examine, or ask for specific instructions, were tactical or strategic decisions which fall within the wide range of objectively reasonable professional assistance and was not ineffective under *Strickland v. Washington*, 466 U.S. 668, 687 104 S.Ct. 2052, 2064 (1984). The district judge, in adopting the magistrate's recommendation, found that the testimony of both Garza and the FBI agents detailed international phone calls in which the murder plot was embraced. The district court noted

that the absence of "collect" calls was not fatal, because direct international calls would satisfy the jurisdictional nexus.

In support of her Application for COA, Petitioner makes the following arguments: (1) reasonable jurists would find that the Magistrate erred in concluding as a matter of law that the omissions Cisneros attributed to her trial counsel are within the realm of tactical determination and do not constitute objectively unreasonable performance; and (2) reasonable jurists should find that the Magistrate unfairly treats the facts by asserting that a review of the trial transcripts reveals that the alleged deficiencies were the result of conscious and informed decision making on trial tactics and strategy.

Petitioner's arguments are weak at best. The necessary showing for a COA requires more than just stating that reasonable jurists would find that the district court erred. Petitioner must show reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. This involves reviewing the constitutional analysis made by the district court and pinpointing any errors and presenting arguments to the contrary which are supported by relevant legal authority. Petitioner has failed to do this.

Petitioner instead argues that defense counsel " . . . had no strategy but merely unreasonably failed to investigate, cross examine, or exclude evidence . . . " and " . . . no reasonable strategy is imaginable for

those acts/omissions. . . ." *Application for COA,* Docket No. 26, p. 25, n.10. Petitioner concludes that "[t]rial counsels' failure to cross-examine Martinez was not the result of any strategic decision and there is clear prejudice." *Id.* at 24. Petitioner further contends that the district court could not properly address the ineffectiveness issue because it cannot "draw factual conclusions based upon a record that obviously is deficient without further development" where the "preparation and motives of trial counsel should be examined". *Id.* at 24.

Petitioner apparently misunderstands the *Strickland* standard and finds that prejudice exists with no underlying analysis. Petitioner cannot establish ineffectiveness by merely conceding that counsel was ineffective and concluding that the performance was prejudicial. Petitioner must demonstrate both that counsel's performance was deficient and that the deficiency prejudiced the defense such that the result of the trial would have been different. *Id.* at 687, 104 S.Ct. at 2064. Both prongs must be shown by a preponderance of the evidence. *Rector v. Johnson,* 120 F.3d 551 (5th Cir.1997). To establish the first prong of deficient performance, Petitioner must show that her trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. However, this Court must be "highly deferential" of counsel's performance and must make every effort to "eliminate the distorting effects of hindsight." *Id.* at 689, 104 S.Ct. at 2065. Therefore,

we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

For the second prong, Petitioner must show a reasonable probability that the result of the proceedings would have been different but for counsel's unprofessional errors. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. The possibility of a different outcome is not sufficient to prevail on the prejudice prong. *Ransom v. Johnson,* 126 F.3d 716, 721 (5th Cir.), cert. denied, 522 U.S. 944, 118 S.Ct. 361, 139 L.Ed.2d 281 (1997). Rather, the defendant must demonstrate that the prejudice rendered sentencing "fundamentally unfair or unreliable." *Id.* (quoting *Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S.Ct. 838, 843, 122 L.Ed.2d 180 (1993)). Counsel's performance is considered effective so long as it is based upon adequate investigation. *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999)

Petitioner's allegations are not sufficient, however, to demonstrate that she was denied the effective assistance of counsel. There is a strong presumption that trial counsel rendered adequate assistance and that the challenged conduct was the product of reasoned trial strategy. *Strickland* at 690, 104 S.Ct. at 2066. It requires the defendant to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 689. Petitioner's bald assertion, that

the deficient acts were not part of a strategy, does not counteract *Strickland's* presumption.

First we consider Petitioner's arguments regarding cross examination of Martinez Petitioner argues that defense counsel would have liked to have Martinez testify that Garza called her from Texas only. However, questions about the phone calls may have put Martinez's credibility at issue in light of her prior statements about receiving only "collect" calls and the absence of collect calls in the telephone records. Martinez stated, in pre-trial FBI interviews, that the calls she received from Garza were "collect". Despite these statements, telephone call logs revealed that no collect calls were received, thus placing Martinez's credibility at issue. Defense counsel, as part of their reasoned strategy, may not have wanted to question Martinez in anticipation of this inconsistency. Therefore, the defense would have foregone the opportunity to cross examine on this issue, concluding that it would have no effect. Any testimony by Martinez, regarding a lack of jurisdictional nexus (i.e. only calls from Texas) may not have been believable, as a result of Martinez's inconsistent statements about the alleged "collect" calls. Decisions about whether to conduct cross examination or the scope of cross examination are tactical decisions made as part of a trial strategy. *See U.S. v. Stedman,* 69 F.3d 737, 740 (5th Cir. 1995); *Prejean v. Smith,* 889 F.2d 1391, 1398-99 (5th Cir.1989) (defendant was not denied effective assistance because of attorney's decision not to call character witnesses, where cross-examination would

have revealed unfavorable facts about defendant's criminal history).

As for counsel's failure to request the causation and jurisdictional nexus instructions, Petitioner likewise fails to overcome the presumption that these actions were part of a reasoned trial strategy. As the district court noted, after Petitioner's proposed instructions were refused "counsel could have assumed, with near certainty, that any definition the court would give would be less favorable considering her view of the case than the ne they proposed." *Memorandum Opinion and Order,* Docket No. 22, p. 16, n.7. "To second guess that decision – which may have been a well thought out strategy – would be the height of 'Monday-morning quarter-backing,' a process the Supreme Court wisely counseled against in *Strickland." Id.*

Petitioner has also failed to demonstrate prejudice. Petitioner argues that the defense counsel's failure to use "Martinez's state court testimony and her statements to FBI Agent Church. . . . undermines confidence in one of the two jurisdictional bases (i.e. telephone calls)" and there is "a reasonable probability that the result of the trial would have been different." *Application for COA,* Docket No. 26, p. 27. Just because Martinez's testimony may have included statements that she believed Garza's collect calls to be from Texas, doesn't necessarily negate Garza's testimony that he made pre-paid direct calls from Mexico.

The jury would still have had to weigh Martinez's and Garza's credibility regarding their testimony about the origin of the calls. Even if the jury was given the instructions that Petitioner suggests, it may still have found Garza's and Agent Church's testimony credible, i.e. that Garza made phone calls from Mexico which embraced the murder-for-hire scheme. The possibility of a different outcome is not sufficient to prevail on the prejudice prong. Rather, the defendant must demonstrate that the prejudice rendered sentencing "fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 843 (1993).

Petitioner has failed to make this showing. Tactical determinations, even those which later prove to be in error, are not sufficient. The Sixth Amendment does not guarantee the right to errorless counsel. Petitioner has not shown that reasonable jurists would find the district court's assessment of her Sixth Amendment claims debatable or wrong. Petitoner is not entitled to a COA on this issue.

Issue 8

Ineffective Assistance of Appellate Counsel

In her motion to vacate, Petitioner attacked the performance of her appellate counsel on the basis of the failure to adequately challenge: (1) the required relationship or "furtherance" instruction; (2) the omission of the causation instruction; (3) motion to dismiss the indictment based on prosecutorial

misconduct. The district court found that appellate counsel was not ineffective because:

> (1) the challenge to the "required relationship" instruction was raised on appeal (Issue No. 3, Subsection B) as a non-frivolous thoroughly briefed appellate point addressed by the Fifth Circuit in both panel opinions and found to be without merit;
>
> (2) the challenge to the lack of a "causation" instruction was raised on appeal as a non-frivolous thoroughly briefed appellate point which the Fifth Circuit chose *not* to address in either of its panel opinions (possibly because defense counsel failed to object and preserve error);
>
> (3) counsel does not have a duty to raise every colorable claim; counsel did not unreasonably fail to discover this nonfrivolous issue; Petitioner failed demonstrate prejudice.

In her Application for COA, Petitioner makes a creative but completely misguided argument regarding counsel's failure to adequately challenge the "required relationship" and "causation" instructions. Petitioner argues that assuming these two issues were not adequately preserved at trial, the Fifth Circuit could and should have reviewed them for plain error, as set forth in FED.R.CRIM.P. 52, which provides that "[a] plain error that affects substantial rights may be considered even though it was not to the court's attention." Petitioner fails to comprehend

that the required showing for a COA is that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong (i.e. appellate counsel was not ineffective). Therefore, Petitioner's focus should be appellate counsel's efforts and any possible prejudice resulting from arguments that counsel unreasonably failed to raise.

Instead, Petitioner focuses on the actions of the Fifth Circuit and suggests that they could have reviewed the challenged instructions for "plain error." Again, Petitioner is requesting that the district court, on collateral review, pass judgment on the Fifth Circuit's disposition of Petitioner's appellate case. This court declines such invitation. The fact remains that Petitioner challenged both instructions on appeal (even if not properly preserved at trial) and appellate counsel thoroughly briefed those points.

Under the standard for ineffective assistance on appeal, *see Smith v. Robbins*, 528 U.S. 259, 285 120 S.Ct. 746, 764 (2000), Petitioner has failed to meet the first prong, i.e. counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. Appellate counsel did discover the challenges to both instructions and filed a merits brief raising them. What the Fifth Circuit chooses to do, or not do, with the information in the briefs cannot be attributed to appellate counsel. Petitioner has not shown that reasonable jurists would find the district court's assessment of the ineffective assistance claim debatable or wrong. Petitioner is not entitled to a COA on this issue.

Lastly, Petitioner argues that her appellate counsel was ineffective for not raising on appeal, the trial court's denial of defendant's motion to dismiss the indictment based on prosecutorial misconduct. Petitioner's prosecutorial misconduct claim was based on the: (1) prosecutor's alleged abuse of grand jury subpoena power in violation of FED. R. CRIM. P. 6; and the (2) prosecutor's alleged sponsorship of false testimony by FBI Agent Church. The district court found that assuming appellate counsel unreasonably failed to raise these issues on appeal, she did not demonstrate prejudice, i.e. that there was a reasonable probability that, but for counsel's failure, defendant would have prevailed on her appeal. To be entitled to a COA, Petitioner must show that reasonable jurists would find the district court's prejudice analysis was debatable or wrong. Petitioner has not done this.

Petitioner has not clearly set forth which sections of Rule 6 she believes have been violated. Petitioner fails to show how the structural protections of Rule 6 were compromised. The record shows that the prosecutor issued three subpoenas returnable to the Brownsville Grand Jury (two for the telephone records of Maria Martinez and Daniel Garza and one for the appearance of FBI Agent Church). However, at the time the subpoenas were issued, there was no grand jury sitting in Brownsville, Texas. The prosecutor filed a proper disclosure order pursuant to Rule

6(e)(3)(C)[4] (court authorization not needed) and transferred the case to Houston. FBI Agent Church testified before the Houston Grand Jury, which returned the indictment.

There were not two grand juries as Petitioner suggests. There was only one grand jury (the Houston Grand Jury) which reviewed the evidence and returned an indictment. Petitioner has not shown that merely because the subpoenas were made returnable to Brownsville that this somehow amounts to a violation of Rule 6.[5] The prosecutor is free to go to any grand jury throughout the Southern District to seek an indictment. The prosecutor filed the proper disclosure order and transferred the case to Houston. The subpoenas correctly called for the witness to come before the grand jury and not the United States Attorney. There is no hint of a Rule 6 violation.

At trial, defense counsel, in support of his motion to dismiss the indictment, insinuated that the Houston Grand Jury was constitutionally prohibited from

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[4] An attorney for the government may disclose any grand-jury matter to another federal grand jury.

[5] *See United States v. Thompson*, 251 U.S. 407, 40 S.Ct. 289 (1928); *United States v. Owens-Corning Fiberglass Corp.*, 271 F.Supp. 561, 566 (N.D.Cal.1967); *United States v. Culver*, 224 F.Supp. 419, 432 (D.Md.1963); *In Re Grand Jury Investigation of Banana Industry*, 214 F.Supp. 856 (D.Md.1963); *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F.Supp. 519, 522 (D.C.N.Y.1974).

reviewing the evidence if a Brownsville Grand Jury had already decided not to return an indictment.

> MR. CANALES: How do I know perhaps he [the prosecutor] received information from this Grand Jury and got no billed and he took it somewhere else and they get a bill. They cannot do that, Your Honor. So that's the reason I am trying to find out what happened in Houston as to what happened here. And our motion goes to that.

4 R. 24-27.

If the basis of Petitioner's motion to dismiss the indictment is that the prosecutor is constitutionally barred from using the Houston Grand Jury, her argument is clearly erroneous. The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so. *See Ex parte United States,* 287 U.S. 241, 250-251, 53 S.Ct. 129, 132, 77 L.Ed. 283 (1932); *United States v. Thompson,* 251 U.S. 407, 413-415, 40 S.Ct. 289, 292, 64 L.Ed. 333 (1920).

Petitioner also argues that FBI Agent Church falsely testified before the grand jury (February 23, 1998) when he stated that Garza said, he would always call Martinez "collect". Petitioner reasons that Agent Church falsely testified because he had already received the subpeoned telephone records reflecting that no collect calls had been made to Martinez.

Petitioner states, "Church was in possession of competent exculpatory evidence that directly contradicted his sworn testimony. . . . and he did not address it." *Application for COA,* Docket No. 26, p. 31. Petitioner's argument is without merit.

The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. *See United States v. Calandra*, 414 U.S. 338, 344-45, 94 S. Ct. 613, 618, 38 L.Ed.2d 561, 569 (1974). Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. *Id.* However, it is a violation of 18 U.S.C. § 1623(a) to knowingly make a material false declaration before the grand jury.

FBI Agent Church told the grand jurors that Garza stated he called Martinez collect. This was not a false declaration. Garza did, in fact, tell Agent Church that he called Martinez collect. Agent Church merely relayed Garza's statements. Whether or not Garza was correct in his characterization of the calls as "collect" does affect the veracity of Agent Church's statements regarding Garza's interview testimony. The prosecutor did not cause Agent Church to testify falsely. Although the prosecutor may have had doubts about the accuracy of Garza's statements, it does not equate to having knowledge of falsity.

The grand jury 'can investigate merely on suspicion that the law is being violated, or even because it

wants assurance that it is not.'" *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297, 111 S.Ct. 722, 726 (1991) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643, 70 S.Ct. 357, 364 (1950)). It need not identify the offender it suspects, or even "the precise nature of the offense" it is investigating. *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471 (1919). The grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. *See United States v. Calandra,* 414 U.S. 338, 343, 94 S.Ct. 613, 617 (1974). The Fifth Amendment does not require the prosecutor to disclose exculpatory evidence in his possession to the grand jury. *U.S. v. Williams,* 504 U.S. 36, 45, 112 S.Ct. 1735, 1741 (1992). Requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body. *Id.* at 51.

> Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system. If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done-rather than requiring the prosecutor to say what he knows in defense of the target of the investigation-is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd.
>
> *Id.* at 52.

Petitioner characterizes the phone records as exculpatory evidence, although it is not. As this Court discussed earlier at length, Garza's characterization of the calls as "collect" may have been an innocent misnomer due to a communication or translation factor. Therefore, it would not necessarily be exculpatory evidence, that is to say, that Garza may have still made the calls from Mexico, although they were not "collect". Assuming that Agent Church reviewed the phone records, he was not required to explain the absence of collect calls to the grand jurors. The grand jurors were given the phone records and could have made that conclusion themselves. The Houston Grand Jury was free to evaluate the discrepancy between Garza's statements (relayed through Agent Church) and the phone records, as both were before them. Agent Church did not have to explain the discrepancy, as it was plainly in front of the grand jurors. Even if the phone records were exculpatory evidence, the record shows that the grand jurors received it. In any event, neither Agent Church nor the prosecutor was required to present exculpatory evidence to the grand jury.

A district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants. *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 256, 108 S.Ct. 2369, 2374 (1988). Dismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict

was free from the substantial influence of such violations. *Id.* at 256.

Petitioner has failed to establish prejudice, i.e. that had his appellate counsel raised the trial court's denial of his motion to dismiss the indictment, he would have prevailed on appeal. First, Petitioner has failed to show that the prosecutor committed a violation of Rule 6 and there was an error in grand jury proceedings. Second, the fact that a Houston Grand Jury and not a Brownsville Grand Jury returned the indictment does not influence the jurors' decision to indict, therefore the error, if any, did not prejudice the defendant. Third, the phone records were not exculpatory in nature, and even if they were, the grand jurors did receive them even though the government had no duty to disclose exculpatory evidence. Therefore, the prosecutors conduct was not a significant infringement on the grand jury's ability to exercise independent judgment.

The district court found that Petitioner had failed to establish the prejudice prong of his ineffective assistance of appellate counsel claim. From the above analysis it is clear that the district court's denial of Petitioner's claim was not wrong or debatalble among reasonable jurists. Petitioner is not entitled to a COA on this issue.

Issue 9

Abuse of Discretion by the District Court

Petitioner argues in her Application for COA that "[a] reasonable jurist could find that this Court abused its discretion by rendering a decision on the claims. . . . without granting her the fair opportunity to expand the record through discovery and an evidentiary hearing." *Application for COA*, Docket No. 26, p. 32. Petitioner filed a Motion for Discovery (Docket No. 9) seeking discovery regarding her seventh, eight, and ninth claims for relief which dealt with the changes that occurred in Garza's testimony about the telephone calls. Petitioner wished to obtain the deposition of: (1) FBI Agent Freddy Vela; (2) FBI Agent David Church; (3) Assistant US Attorney Oscar Ponce; (4) Assistant US Attorney Mervyn Mosbacker; and (5) any and all evidence of interviews by the Government with Garza. The undersigned magistrate judge denied Petitioner's motion for discovery (Docket No. 13) noting Garza was subjected to cross examination at trial and his testimony was evaluated by a jury that ultimately convicted the Petitioner. The undersigned magistrate judge further noted that the Fifth Circuit reviewed the issue of Garza's change in testimony and concluded:

> Given [Garza's] language difficulties, some confusion during the interview with [FBI Special Agent] Church would be expected. . . . It is not [the Fifth Circuit's] province to become embroiled in a credibility debate between Church and Garza.

United States v. Cisneros, 203 F.3d 333, 344 (5th Cir. 2000).

To obtain a COA, a petitioner a must make a substantial showing of a denial of a constitutional right "regarding each claim for habeas corpus relief sought to be appealed". 28 U.S.C. § 2253(c)(3). A contention not raised by a habeas petitioner in his/her petition filed in the district court cannot be considered for the first time on appeal. *Johnson v. Puckett,* 930 F.2d 445 (5th Cir. 1991). Petitioner's complaint regarding the denial of her discovery motion is not a constitutional claim which was raised in her motion to vacate. A COA cannot issue on a claim that was not presented in the motion to vacate. Put another way, Petitioner cannot raise a new complaint in her Application for COA, which was not present in her habeas petition. A COA issues only upon those claims of constitutional error which were denied by the district court and upon which an appeal is being sought. Petitioner is not entitled to a COA on this issue.

III. Recommendation

IT IS RECOMMENDED that Petitioner's Application for COA (Docket No. 26) be DENIED on ALL ISSUES.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall

bar that party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415 (5th Cir. 1996).

DONE at Brownsville, Texas, this 4th day of April, 2007.

/s/ John Black
John Wm. Black
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
—BROWNSVILLE DIVISION—

UNITED STATES OF AMERICA	§	
	§	
	§	CIVIL NO. B-02-191
v.	§	
	§	
DORA CISNEROS	§	

MEMORANDUM OPINION AND ORDER

Before the Court is the Report and Recommendation of the United States Magistrate Judge in which he recommended that Petitioner's Motion to Vacate, Set Aside, and Correct Judgment and Sentence [Docket No. 1] be denied. That report also recommended that the Government's Motion to Dismiss [Docket No. 5] be granted. Petitioner has filed lengthy and detailed objections to the Magistrate's rulings. [Docket No. 21] Aside from the more straight-forward legal issues, this case and Petitioner's objections to the Report and Recommendation present this Court with a somewhat unique opportunity. In addition to other bases for Petitioner's motion to vacate pursuant to 28 U.S.C. § 2255, he is, sometimes directly and sometimes more implicitly, requesting this District Court to hold that the Fifth Circuit Court of Appeals and subsequently the United States Supreme Court violated her constitutional rights and/or committed error. Rarely is a district court put in such a position and it is necessary to explain the procedural history of this matter to understand portions of the Petitioner's argument and how she has called upon this

Court to rule on the actions of the Supreme and Circuit Courts.

I.

Background Facts and Procedural History

This case arises out of the 1993 murder of Joey Fischer, a high school student at St. Joseph Academy in Brownsville, Texas. During the spring of 1992 Fischer began dating Cristina Cisneros, a fellow high school student, but ended the relationship shortly thereafter. Dora Cisneros, Cristina's mother, became upset about the break-up and, after attempting to reunite the teens, went to Maria Martinez, a local fortune teller (curandera), to arrange for Fischer's murder. Martinez asked one of her other clients, Daniel Garza, to hire someone to kill Fischer.

Garza discussed hiring a killer in several telephone conversations with Martinez. According to Garza's testimony at trial he made some of those calls from Mexico. Garza eventually hired Israel Olivarez and Heriberto "Eddie" Pizana, who worked for the Cuellar crime family. On the evening of March 2, 1993, a car with Mexican license plate number "821 THE7" crossed from Mexico into Brownsville, Texas. Later that night Pizana and Ramon Palomares, another hit man for the Cuellar family, checked into the La Quinta Inn in Brownsville and the receptionist registered their car as a white Grand Marquis with a Mexican license plate number of "821 TWEX" or "821 THE7" (the receptionist's handwriting was

apparently difficult to decipher). Fischer was shot and killed as he left his house for school the next morning. Interestingly, a witness testified to passing a white four-door car with a Mexican license plate near Fischer's home at the time of the murder. Shortly thereafter, Garza and Pizana collected the money for the hit from Martinez. Garza attempted to leave the money with Pizana, but he insisted Garza return with him to the La Quinta Inn and give the money directly to Olivarez. After giving the money to Olivarez, Garza noticed that Olivarez and Pizana had two cars – a white pickup truck with a black stripe and a white Ford.

Cisneros was originally tried in state court, convicted of capital murder, and sentenced to life in prison. The Thirteenth Court of Appeals sitting in Corpus Christi overturned the conviction, holding that the evidence was insufficient to support a conviction. *Cisneros v. State,* 915 S.W.2d 217 (Tex. App. – Corpus Christi 1996) *pet. ref'd* 935 S.W.2d 789 (Tex. Cr. App. 1996) (*en banc*). The Court of Criminal Appeals affirmed, explaining that despite the fact that Cisneros "wanted her daughter's former boyfriend dead[,] engaged a fortune teller[ ] to find someone to kill him [and even] . . . supplied money, information, and directions [to the fortune teller]," there was not sufficient evidence to prove the individuals hired by the fortune teller were actually the ones who committed the crime. *State v. Cisneros,* 935 S.W.2d 789 (Tex. Crim. App. 1996).

Defendant was then tried and convicted under the federal murder-for-hire statute, 18 U.S.C. § 1958, in the United States District Court for the Southern District of Texas. Cisneros appealed, arguing that: (1) there was not "sufficient evidence to show that Cisneros met the interstate/foreign commerce requirement for a federal murder-for-hire conviction," (2) a new trial was necessary because the government elicited testimony about the state court murder convictions, (3) the district court erred in rejecting five of Cisneros' proposed jury instructions, (4) "the district court erred in admitting the evidence of Fischer's murder under Fed.R.Evid. 403," (5) "the conviction should be reversed because the district court failed to maintain an appearance of impartiality in its questioning of witnesses and comments made during the trial," and (6) the district court abused its discretion by "admitting Moreno's testimony under the co-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E)." *United States v. Cisneros,* 194 F.3d 626 (5th Cir. 1999). The Fifth Circuit affirmed the judgment of the district court, rejecting each of Cisneros arguments. *Id.* The court held that there was sufficient evidence for a jury to find that Garza made phone calls from Mexico and that this was enough to meet the interstate/foreign commerce requirement. *Id.* at 635-36. The court rejected arguments that Cisneros did not cause the telephone to be used "in furtherance" of the murder, explaining that mere "but for" causation was all that was required. *Id.* at 636. The court also pointed out that "[b]ecause these telephone calls satisfy the interstate nexus

requirement, we need not address the more complicated issue, the car travel between Mexico and Texas." *Id.* at 637. Turning to Cisneros' arguments that the government elicited testimony regarding the state court proceedings, the Fifth Circuit held that "[t]he admission of this testimony was not an abuse of discretion, since there was no chance of any 'significant impact' on the jury verdict." *Id.* Evaluating each of the jury instructions individually, the Fifth Circuit rejected each objection lodged by Cisneros.[1] Addressing Cisneros' argument that the district court erred in admitting evidence of Fischer's murder, the court stated that Cisneros' "offer to stipulate to the shooting of Fischer did not reduce the probative value of evidence of how Fischer's parents found their son, the pathologist's testimony about Fischer's autopsy, or

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[1] The first jury instruction sought by Cisneros, "that the interstate/foreign commerce connection had to have been 'in furtherance' of the murder for hire," was rejected as it articulated an improper standard under Fifth Circuit precedent. *Id.* at 638. Cisneros' second requested jury instruction, which amounted to an instruction on the burden of proof, was rejected because "the district court repeatedly emphasized that the government carried the burden." *Id.* The third proposed instruction, which "sought to limit the jury's consideration of tape-recorded conversations," was not included because Cisneros failed to make a proper objection at trial. *Id.* The fourth instruction, which concerned the issue of causation, was rejected because it was inconsistent with Fifth Circuit precedent. *Id.* at 639. Finally, the fifth desired instruction, which involved the statute of limitations, was properly rejected because "[i]ts omission did not impair Cisneros' ability to present a defense because there was no defense under the statute of limitations." *Id.*

the photographs of Fischer's corpse." *Id.* at 639. "The probative value of the challenged evidence, therefore, was not substantially outweighed by the danger of unfair prejudice." *Id.* In response to Cisneros' arguments that "the district court failed to maintain an appearance of impartiality," the Fifth Circuit explained that "[a] trial court has the discretion to clarify testimony, even if that elicits facts harmful to the defendant." *Id.* at 640. The court further explained that any potential impartiality the jury might have suspected was cured by the court's instruction that the it had no opinion on the case and the jury should disregard any statements that would indicate otherwise. *Id.* at 641. Finally, the court held that admitting Moreno's testimony under the co-conspirator exception to the hearsay rule was not error because "[t]he government met its burden of proving the co-conspirator exception to the hearsay rule by a preponderance of the evidence" by showing Moreno was a member of the Cuellar organization in which Palomares and Olivarez worked as hit men. *Id.*

On petition for rehearing, the Fifth Circuit panel applied different reasoning to certain arguments advanced by Cisneros, but reached the same conclusion, affirming the district court. *United States v. Cisneros,* 203 F.3d 333 (2000). In addressing Cisneros' argument that "the evidence did not establish that she caused the telephone to be used 'in furtherance' of the murder-for-hire," the court abandoned its previous holding that "but for" causation was all that was required, holding that Martinez' constant reminders

during the telephone calls "facilitated" in bringing the murder to fruition. *Id.* at 344-45. The court also expanded on its previous holding that the district court did not err in failing to instruct the jury "that the use of the facility in foreign commerce had to have been 'in furtherance' of the murder-for-hire," explaining that the standard in the Fifth Circuit is "facilitated" or "made easier." *Id.* at 346. Thus, even though Garza's phone calls to Martinez arguably may not have been "in furtherance" of the murder-for-hire, the calls "facilitated" the murder because they allowed Martinez to advance the plot to kill Fischer. *Id.* Finally, the panel elaborated on its holding that the standard for causation argued by Cisneros was inconsistent with Fifth Circuit precedent. It ultimately decided Cisneros' proposed instruction was incorrect, finding no error on the part of the district court. *Id.* at 347. Thus, although the court's decision to grant a rehearing had the effect of vacating the opinion found at 194 F.3d 626, the only pertinent substantive changes were those discussed above.

On February 24, 2000, the Fifth Circuit, *sua sponte*, granted a rehearing *en banc*. *United States v. Cisneros*, 206 F.3d 448 (5th Cir. 2000). Although Cisneros had filed a motion for rehearing *en banc* on virtually every point it had presented to the panel on two occasions, the court explained that the *en banc* hearing was granted to reconcile the dicta that "to satisfy the jurisdictional element, a facility must be used in an *inter* state fashion," found in *United States v. Cisneros*, 203 F.3d 333 (5th Cir. 2000), *vacating* 194

F.3d 626 (5th Cir. 2000), with the holding that *intra* state use is sufficient, found in *United States v. Marek,* 198 F.3d 532 (5th Cir. 1999). *United States v. Marek,* 238 F.3d 310, 313 (5th Cir. 2001). As pointed out in Cisneros' Petition, the *en banc* court chose only to address the conflict between *Marek* and *Cisneros* regarding the use of interstate commerce under the murder-for-hire statute.

Because the Fifth Circuit's decision to rehear the case *en banc* "had the collateral effect of vacating both panel decisions,"[2] Cisneros now argues in this § 2255 proceeding that she was denied her right to an appeal by the court's failure to reinstate either of the panel decisions. [Docket No. 1] The *en banc* decision was not the end of the procedural story as Cisneros moved for an additional rehearing of the *en banc* opinion on the remainder of her points of error and eventually sought relief from the United States Supreme Court, where her Petition for Writ of Certiorari was denied. *United States v. Garcia Cisneros,* 534 U.S. 813 (2001). In her Petition before the Supreme Court, Cisneros asked that it "grant review, vacate the Fifth Circuit *en banc* opinion as it relates to Petitioner, and remand the case with instructions that, since the *Marek en banc* decision did not address any of the material issues in Petitioner's case, the Fifth Circuit should reinstate the second Cisneros panel opinion, except as it addresses the issue taken

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[2] *Marek,* 238 F.3d at 313.

up in the *en banc* opinion." *Pet. for Writ of Cert.*, No. 00-1526, 2001 WL 34125493 (Apr. 4, 2001). Her Petition for Writ of Certiorari was denied. *Garcia Cisneros v. United States,* 534 U.S. 813 (2001).

The record before this Court reveals three significant facts: (1) the Fifth Circuit's first and second panel decisions addressed each issue raised by Cisneros and denied each one in turn; (2) the Fifth Circuit's second panel decision at 203 F.3d 333 vacated the first and was itself vacated by the court's *en banc* opinion in *United States v. Marek*, 238 F.3d 310 (2001); and (3) both the Fifth Circuit sitting *en banc* and the United States Supreme Court were made aware of this situation, but denied Cisneros relief. Having been denied review by both of those courts, Cisneros now attempts to reargue before this Court most of the same issues she has already unsuccessfully argued to the Fifth Circuit.

II.

Petitioner's Objections

Petitioner's objections to the Report and Recommendation can be divided into four somewhat overlapping categories. The first category is one of a factual nature, but it is used by Petitioner throughout her legal objections. It concerns the Fifth Circuit statement in its *en banc* opinion that it was undisputed that "the hit men traveled from Mexico to Brownsville, Texas where they shot and killed Cisneros's intended victim." 238 F.3d at 314. The

second group of objections are more legal in nature and are centered around the Magistrate's use of the "law of the case" doctrine in overruling certain objections. The third category of complaints deals with her claim that no appellate court ruled on the objections raised in her initial appeal. The fourth category of objections is focused upon the trial court's instructions to the jury – especially those relating to the causation and required relationship instructions.

A. Factually-Based Allegations

1. International Travel of the Hit Men

As stated above, the Fifth Circuit maintained in its *en banc* opinion:

> The relevant facts in Cisneros also are undisputed at this juncture. . . . The hit men traveled from Mexico to Brownsville, Texas where they shot and killed Cisneros's intended victim.[3] A jury convicted Cisneros, and she appealed. A panel of this Court concluded that a reasonable jury could have found that: (1) the fortune teller had participated in international calls as Cisneros's agent; and (2) that those calls were sufficiently connected to the murder to be "in furtherance" of that crime. That panel, therefore, affirmed the conviction.

Id. at 314.

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[3] Referring the reader to the factual recitation found in the second panel decision at 203 F.3d 337-39.

Petitioner goes to great lengths to attack the "undisputed" statement that the hit men traveled from Mexico to Brownsville, Texas. She disputes both the factual accuracy of the statement and the fact that it is undisputed. She details the testimony that seems to support the conclusion that the hit men, rather than merely crossing the Matamoros/Brownsville border, actually came down to Brownsville from Dallas where they had been engaged in various enterprises for the Cuellar crime organization. Most of this evidence was adduced at trial by the Government and was argued by the Government in its presentation to the jury. Petitioner concludes that the Fifth Circuit was "dead wrong."

The importance of this alleged factual error, if it be so, to the Petitioner's point-of-view, is that if this factual nexus does not exist, then 18 U.S.C. § 1958 cannot be properly applied to her. This presents this Court with at least two interesting questions: First, can a district court overrule "factual findings" made by a Circuit Court of Appeals? Second, in this case, does it matter if the Court of Appeals was in fact "dead wrong"? Obviously, the Fifth Circuit can and has been reversing factual findings of district courts when they are "'left with a definite and firm conviction that a mistake has been made.'" *Mumblow v. Monroe Broadcasting, Inc.*, 401 F.3d 616, 622 (5th Cir. 2005) (quoting *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 533 (5th Cir. 2003)). Petitioner cites no authority which would support a district court's overruling either a factual statement

made by a Fifth Circuit panel or made by the Court sitting *en banc*. While some courts might even relish the chance presented by this novel situation, this Court sees no need to avail itself of this unique opportunity.

The Circuit, in its *en banc* consideration of Petitioner's appeal, was primarily concerned with a budding conflict between two of its panels concerning the second prong of 18 U.S.C. § 1958, which proscribes paying another to commit murder only if the defendant "uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce." The panel in Petitioner's case had suggested that a facility must be used in an interstate fashion (and, therefore, presumably intrastate use of a facility would not suffice even if that facility is generally an interstate commerce facility). The panel in *United States v. Marek*, 198 F.3d 532 (5th Cir. 1999), while divided, held that wholly intrastate use of an interstate facility was sufficient to support § 1958 jurisdiction. The Circuit in the consolidated *en banc* appeal chose to follow the rule suggested by the *Marek* majority to the effect that the use of an interstate commerce facility "satisfies the jurisdiction requirement of prong two of § 1958, regardless of whether its use was *inter* state or wholly *intra* state."

The Circuit noted that the *Marek* panel had even considered the panel's discussion in *Cisneros*, but the *Marek* panel reasoned that due to the international telephone calls – "an activity that indisputably satisfied the jurisdictional element" – the discussion in *Cisneros* was dicta. The *en banc* opinion also

described the statements by the *Cisneros* panel as dicta and, in doing so, impliedly adopted *Marek's* reasoning. *Id.* at 313.

It is that same reasoning that relieves this Court of its need to consider the factual accuracy of the above-referenced Fifth Circuit description of the path followed by the hit men or whether that path was a disputed issue. That statement is merely dicta in the *en banc* opinion. In the very paragraph containing the complained of statement the court explained that the panel decision was based upon their conclusion that the international phone calls were a sufficient nexus. *Id.* at 314. The *en banc* court then concludes:

> In *Cisneros,* on the other hand, even if we assume *arguendo,* that the statute [18 U.S.C. 1958] should be accorded the narrowest interpretation possible, we must affirm Cisneros' conviction on the strength of the international (foreign) telephone calls.

Id.

2. The Telephone Calls[4]

Clearly, the *en banc* panel relied on the phone calls for the jurisdictional basis, rather than the hit

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[4] While this Court does not view either of the prior Fifth Circuit panel opinions as triggering the application of the "law of the case" doctrine, (*see* Section II.C), it is instructive that the vacated panel opinions found at 203 F.3d 333, 344 (5th Cir. 2000) and 194 F.3d 626, 636 (5th Cir. 1999) also reviewed the factual sufficiency of these phone calls and the issue of the so-called collect calls and found no error.

men. Perhaps in recognition of that, Petitioner also questions the phone calls. Petitioner attacks the phone calls on both a factual and a legal basis. The factual basis will be discussed here, while the legal basis (which primarily focuses on the instructions given to the jury and as a basis for an ineffective assistance claim) will be discussed below.

Factually, the controversy centers around witness Daniel Garza and the phone calls he made to Maria Martinez, Cisneros' curandera. These calls are, of course, the basis of the jurisdictional nexus as discussed above and in both panel decisions. Petitioner claims that the prosecution mislead the grand jury as to whether the phone calls were collect. Garza testified at trial that he did not remember exactly, but could not have made more than one collect call. The witness was questioned about these inconsistencies at trial, so the jury could judge his memory and credibility. The Magistrate Judge's conclusions concerning this topic and his analysis of the applicable legal factors are accurate and are hereby adopted.

B. Ineffective Assistance

Next, Cisneros claims that these phone conversations, and their admission at trial, is the basis for an ineffective assistance of counsel claim. Her theory is that her counsel should have: (1) objected to the transcripts; (2) cross-examined more intensively in hopes of proving the calls originated in Texas rather than Mexico; (3) emphasized Garza's inconsistencies;

(4) requested an instruction demanding the jury find the phone calls be sufficiently related to the murder and/or; (5) insisted on a causation instruction. Again, the Magistrate Judge's analysis of these allegations is correct and is hereby adopted.

Cisneros follows this argument with one complaining about her appellate counsel and their alleged failure to: (1) challenge the propriety of the foreign commerce instruction; (2) raise causation as an issue; and (3) raise the alleged "misconduct" before the jury. This court adopts the opinion of the Magistrate Judge on these items. This Court understands why counsel for Cisneros puts emphasis on Agent Church's recollection that the Mexico telephone calls were collect and compares that to Mr. Garza's testimony that they were probably not collect (or at most one was collect). Cisneros, however, leaps to three conclusions which do not necessarily follow: (1) that Agent Church lied to the grand jury; (2) that the absence of collect calls necessarily destroys the international nexus which is the basis for jurisdiction; and (3) that these two events, combined with the failure of counsel to either successfully exploit them, either at trial or on appeal, equates to ineffective assistance of counsel.

Initially, this Court notes that direct (non-collect) calls such as those recounted by Mr. Garza at trial would be sufficient under the murder for hire statute as per controlling Fifth Circuit authority. Secondly, an agent's recollection of, or notes concerning, an event can differ from a witness without either the agent or the witness committing perjury. The important factor

is that both witnesses' testimony detailed international phone calls in which the murder plot was embraced. This is not only the conclusion reached by this Court, but also the one reached by the Fifth Circuit in both vacated opinions. *Cisneros,* 203 F.3d at 343; *Cisneros,* 194 F.3d at 636. Further, it is not true that any of the items complained of would support a claim of ineffective assistance of counsel. The Magistrate Judge's opinion details the evidentiary showing what one must make to succeed on a collateral attack based upon ineffective assistance of counsel.[5] Tactical strategy and determinations, even those which later prove to be in error, do not suffice. Rather, counsel's performance is considered effective so long as it is based upon adequate investigation. Further, there must be a reasonable probability (not a mere possibility) that the result would have been different, but for the alleged errors. *Crane v. Johnson,* 178 F.3d 309, 312 (5th Cir. 1999). This Court adopts the Magistrate Judge's conclusions with regard to the claims of ineffective assistance of trial counsel. Petitioner also

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[5] Cisneros' arguments that the Magistrate's report and recommendation is "unconstitutionally restrictive" and applies the erroneous standards are unavailing. The Magistrate Judge properly applied *Strickland v. Washington,* 466 U.S. 668 (1984), and correctly found that Cisneros did not make the requisite showing to prevail on an ineffective assistance of counsel claim. After evaluating the Magistrate Judge's Report and Recommendation and Cisneros' objections thereto, this Court is satisfied that Cisneros met neither the performance prong nor the prejudice prong of *Strickland* in order to prove an ineffective assistance of counsel claim.

attacks the performance of her appellate counsel on the basis of the failure to adequately challenge: (1) the required relationship or "furtherance" instruction; (2) the omission of the causation instruction; and (3) the failure to raise prosecutorial misconduct. Again, the Magistrate Judge's Report and Recommendation discusses in detail why § 2255 relief should not be granted.[6] As such, this Court will not retrace those footsteps. Suffice to say that such claims have been considered in detail and found to be wanting.

C. Law of the Case

While this Court has considered the Magistrate Judge's Report and Recommendation regarding Petitioner's objections to lack of a causation and required relationship instruction, it cannot totally accept his recitation of the law and applicable facts. With regard to the Cisneros's argument that the jury should have been instructed about the required

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[6] The Fifth Circuit has held in that the failure to object to jury instructions in certain situations does not constitute ineffective assistance and this Court does not feel that the failure to object to the jury instructions in this case rose to the level of ineffective assistance. *See, e.g., Thacker v. Dretke,* 396 F.3d 607, 614 (5th Cir. 2003) (explaining that in order to prevail on an ineffective assistance of counsel claim an individual must show that the attorney's failure to object to the jury charged fell below an objective standard of reasonableness thereby causing prejudice as set forth in *Strickland); Harris v. Warden, Louisiana State Penitentiary,* 152 F.3d 430, 440 (5th Cir. 1998) (holding that trial counsel's deficient performance did not meet *Strickland's* prejudice requirement).

relationship between foreign commerce and the murder for hire scheme, the Magistrate Judge relied upon the vacated Fifth Circuit opinions as establishing a prevailing law of the case standard. The Magistrate Judge accurately described the law of the case doctrine. Reliance on this doctrine, however, is questionable when the decision establishing such "law" has been vacated.

"The doctrine of the law of the case directs that a decision of an appellate court on an issue of law, unless vacated or set aside, governs the issue during all subsequent stages of litigation in the *nisi prius* court and thereafter on any further appeal." *Commercial Union Ins. Co. v. Walbrook Ins. Co.,* 41 F.3d 764, 769 (1st Cir. 1994); *see also Cohen v. Brown Univ.,* 101 F.3d 155 (1st Cir. 1996) (citing Moore's Federal Practice § 0.404 (2d ed. 1993)). It is well established that reconsideration *en banc* vacates a panel's decision. 5TH CIR. R. 41.3 (stating that the "effect of granting a rehearing *en banc* is to vacate the panel opinion"); *see, e.g., Hooten v. Jenne,* 786 F.2d 692, 695 (5th Cir. 1986); *Longoria v. Wilson,* 730 F.2d 300, 304 (5th Cir. 1984). A vacated decision, while persuasive, is no longer binding precedent. *Marathon Oil Co. v. Ruhrgas,* 145 F.3d 211, 225 n.23 (5th Cir. 1998).

While arguments could be made to the contrary, most courts hold that a vacated opinion is deprived of its status such that it cannot be used to trigger the application of the law of the case doctrine. *See, e.g., Johnson v. Bd. of Educ. of the City of Chicago,* 457 U.S. 52, 53-54 (1982); *Brown v. Bryan City, OK,* 219

F.3d 450, 453 n.1 (5th Cir. 2000); *Creighton v. Anderson,* 922 F.2d 443, 449 (8th Cir. 1990); *Dorsey v. Cont'l Cas., Co.,* 730 F.2d 675 (11th Cir. 1984); *Banco Nacional de Cuba v. Farr,* 383 F.2d 166, 177-78 (2d Cir. 1967). That being the case, this Court finds the Magistrate Judge's use of the law of the case doctrine to be ill-advised and specifically chooses not to adopt or follow this line of reasoning. As such, this Court does not consider the vacated opinions to be controlling in this matter.

Despite the fact that the opinions upon which the Magistrate Judge relied were vacated (and thus do not command "law of the case" deference), they can still be instructive. *Ruhrgas,* 145 F.3d at 225, n.23. As detailed in the Magistrate Judge's opinion, the panel addressed in both opinions these very issues regarding the "furtherance" and causation instructions and rejected Petitioner's complaints each time because the requested instructions were not substantially correct and were not consistent with the law in the Fifth Circuit. [Docket No. 18] at 15-20; *Cisneros,* 203 F.3d at 346-47; *Cisneros,* 194 F.3d at 638-39. Both of those holdings are as accurate now as they were when they were written by the Fifth Circuit panels in 1999 and 2000. The *Marek/Cisneros en banc* opinion did not alter the reasoning or the law upon which both panel decisions were based. Further, as noted in the Magistrate Judge's opinion, Cisneros failed to object to the lack of an instruction on the nexus requirement and instead objected only to the refusal of the trial court to use her proposed "furtherance"

instruction. Cisneros has shown no error and certainly has not shown the requisite cause and prejudice which she must to prevail in this action. These requisites have been adequately described in the Magistrate Judge's opinion, as well as in the two vacated Fifth Circuit opinions. This Court, therefore, sees no reason to reiterate what has already been detailed and, while not bound to follow those decisions, sees no valid reason why they are not accurate and why the same reasoning should not be used here.

With respect to the issue of preservation of error and due process on the causation issue, the Magistrate Judge has analyzed this point in great detail and this court adopts the reasoning of the Report and Recommendation. Federal Rule of Civil Procedure 51 requires that a party objecting to a jury instruction or the failure to give an instruction state "distinctly the matter objected to and the grounds for the objection." FED. R. CIV. P. 51. "Where a party argues on appeal that the district court erred in refusing to give a proffered jury instruction, that party must 'show as a threshold matter that the proposed instruction correctly stated the law.'" *Russell v. Plano Bank & Trust*, 130 F.3d 715, 719 (5th Cir. 1997) (quoting *Federal Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994)). In this case the causation instruction submitted by Cisneros was properly denied as it was not a correct statement of the law. When the court refused to include Cisneros' proposed instruction, Cisneros did not offer an alternative definition or object to the fact that there was no definition in the

jury instructions. When the proposed jury instruction misstates the law a district court is "under no obligation to tinker with the flawed proposed instruction until it [is] legally acceptable." *Rogers v. Ingersoll-Rand Co.*, 144 F.3d 841, 845 (D.C. Cir. 1998). That is, "[a] requested instruction is properly refused if it is improper, and a trial court is not required to correct a defective request." *Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983). Furthermore, had the court come up with its own definition of causation and included it in the jury instructions it is unlikely it would have helped Cisneros.[7] Therefore, Cisneros' proposed definition was properly refused as it was incorrect and the court's decision not to included an alternative definition did not prejudice Cisneros.

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[7] Petitioner now claims that her counsel's failure to push for an alternative definition was ineffective assistance of counsel. This is not accurate. Indeed, one can postulate many reasons for not objecting and insisting on the inclusion of *a* definition of cause. One strategic reason readily comes to mind. At the time Petitioner's own offered definition had been refused. That being the case, counsel could have assumed, with near certainty, that any definition the court would give would be less favorable considering her view of the case than the one they proposed. With no definition counsel would still have the latitude to argue that no cause existed and would not be harmed by a more restrictive definition. To second-guess that decision – which may have been a well thought out strategy – would be the height of "Monday-morning quarter-backing," a process the Supreme Court wisely counseled against in *Strickland*. *Strickland*, 466 U.S. at 689; *see also United States v. Molina-Uribe*, 429 F.3d 514, 520 (5th Cir. 2005).

III.

Denial Of Cisneros's Constitutional Rights By The Fifth Circuit And The United States Supreme Court

The most interesting and unusual point raised by the Petitioner is her claim that her constitutional rights were denied by the appellate courts. The genesis of her claim is that the Circuit, in its *en banc* opinion, failed to address each and every point of error in its opinion and that, ultimately, the Supreme Court erred in denying her Petition for Writ of Certiorari in which she argued the Court should order the reinstatement of the second panel opinion. Cisneros' argument is as follows:

(A) The first Fifth Circuit opinion, which did address all of her points of error, was vacated by the second;

(B) The second Fifth Circuit opinion, which also addressed all of her points of error, was vacated by the *en banc* opinion;

(C) The *en banc* opinion, which vacated the second panel decision, addressed only the conflict between the second Cisneros opinion and the opinion in *United States v. Marek,* 198 F.3d 352 (5th Cir. 2001);

(D) Despite the affirmance of the trial court by the Circuit sitting *en banc,* it denied Cisneros's "meaningful appellate review" and worked a "manifest injustice" and in effect denied Cisneros her right to "meaningful review" and "due process."

(E) The Supreme Court, by denying her petition for certiorari, compounded the error by failing to correct the alleged Fifth Circuit error.

It is not clear whether Petitioner is objecting to the Magistrate's Report and Recommendation on this issue or she has chosen to accept his Report in this regard and merely concentrate her complaints on his use of the "law of case" doctrine. In an abundance of caution, this Court will address this somewhat unusual complaint.

Factually, this Court would note that Cisneros has had more appellate review, quantitatively speaking, than most litigants. She has had three judges consider all of her points of error and write one opinion. Those same three jurists granted a rehearing, reconsidered those points, and wrote a new opinion. Then the entire Fifth Circuit voted a rehearing *en banc* and heard her case, including her motion for rehearing. She then filed a petition for writ of certiorari, which was denied by the Supreme Court, in which she raised the subject matter of the panel opinions. Now, in addition to those judges, she has had a United States Magistrate Judge and a different United States District Judge consider her objections. Thus, in terms of sheer numbers, Cisneros has had almost the maximum number of judges one can possibly have review her case.

The Circuit sitting *en banc* ruled that "we therefore affirm both appellants' [*Marek* and *Cisneros*]

convictions and sentences." *Marek,* 238 F.3d at 323. To affirm those convictions, the court had to have given due consideration to any points raised. This Court is unaware of any requirement that an *en banc* panel of the Fifth Circuit write an opinion addressing each point raised before the Panel or each point raised in a motion for rehearing. The *en banc* court also stated "we hold that both Cisneros's and *Marek's* murder for hire transactions violated 18 U.S.C. § 1958. Cisneros did so by causing her agent to make qualifying telephone calls between the United States and Mexico." *Id.*

This Court has not been provided with any authority holding that each opinion of an *en banc* appellate court must address each point of error *or* reinstate a vacated opinion. This Court finds that the due process rights of Cisneros have not been violated. She has had more than twenty-four appellate judges (three of whom considered her case on three separate occasions), two District Judges, and one United States Magistrate Judge consider the merits of her case. Both panel decisions considered all of her points of error, and all appellate judges considered these points when they addressed her motions for rehearing and petition for writ of certiorari. Otherwise, they could not have affirmed her conviction. There is *no* requirement for a court to reduce each such consideration to writing nor is there a requirement that the court reinstate a Circuit Panel opinion, which was vacated by virtue of rehearing *en banc* – especially when one considers Cisneros moved for rehearing *en*

banc. In effect, she is complaining because the result of the rehearing *en banc* was not what she wanted. Cisneros was not deprived of the opportunity to have all her claims raised before the Supreme Court, merely by the failure to write on them by the Fifth Circuit sitting *en banc*. She was free to raise these issues in her petition for certiorari and, if granted, could have had each reviewed despite the Fifth Circuit's failure to address these in writing in the *en banc* opinion.

This holding is not merely an exercise in the obvious as it directly applies to at least two portions of the Magistrate Judge's report to which she objects.[8] Cisneros complains, as discussed above, about the Court's failure to include her proposed causation issue. She admits that she appealed this issue and obtained relief in neither the panel decisions nor the *en banc* decision. She writes that "the objection was preserved on this appellate point, which was raised in full in the prior briefing to the Fifth Circuit." [Docket No. 21] at 17. The fact that the panel decision, which

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[8] It could be argued, however, that the refusal to reinstate the opinion of the second panel could never be harmful error because that opinion affirmed her conviction just as the *en banc* decision did. Thus, if the relief she requested had been granted either by the Fifth Circuit *en banc* or the Supreme Court and the panel decision reinstated, she would still be convicted. Her argument that by their failure to reinstate the second panel decision the Fifth Circuit compromised her rights was presented in her Petition for Writ of Certiorari and denied by the United States Supreme Court. This Court feels no compunction to hold that the Supreme Court committed error in issuing its denial.

addressed in writing and denied Cisneros relief on this point, was vacated does *not* mean this point has not been considered or ruled upon. This affirmance of her conviction by the *en banc* court was a denial of this point of error notwithstanding the fact that the Circuit chose not to write on that issue.

Similarly, Cisneros's objection as to her proposed "furtherance" instructions were also briefed, heard and rejected by the Court of Appeals. While this Court agrees it is not bound by, and will not apply, the "law of the case" doctrine, Petitioner's conclusion that she has never had a "full and fair opportunity" for review is patently false. Her complaints have been considered by two panels, the Fifth Circuit *en banc,* and the United States Supreme Court. Each court denied her relief. Cisneros concludes:

> [I]t is entirely probable that Cisneros's jury convicted her without any finding that either alleged act of foreign commerce (car travel or phone car) facilitated (or was "in furtherance of") the "murder for hire scheme."

To suggest this was not considered by the Court of Appeals ignores both the vacated panel opinions *and* the *en banc* opinion. As quoted above, the Court *en banc* wrote:

> [Cisneros violated the murder for hire statute] by causing her agent to make qualifying telephone calls . . . thereby using a facility in foreign commerce to facilitate a murder for hire.

These issues were obviously before the panel in both of its decisions and before the court sitting *en banc.* Cisneros admits the error was presented and was contained in her briefing to the Fifth Circuit. [Docket No. 21] at 23. She cannot now complain that her arguments were not accepted by a majority of that court. Simply because arguments that were put forth to the court were not accepted does not mean that they were not considered – even if their ultimate rejection was not detailed in an opinion.

Matters that have been rejected on appeal cannot be re-attacked collaterally pursuant to 28 U.S.C. § 2255. *Vernell v. United States,* 559 F.2d 963, 964 (5th Cir. 1977); *Del Genio v. United States,* 352 F.2d 304 (5th Cir. 1965).

IV.

Conclusion

With the few exceptions noted above, the report and recommendation of the Magistrate Judge is adopted. The Respondent's Motion to Dismiss [Docket No. 5] is **GRANTED** and the Petitioner's § 2255 motion is **DENIED.** The Court finds no merit to her claim that her conviction was marred by constitutional infirmities and/or ineffective counsel.

Signed this 28th day of September, 2006.

/s/ Andrew Hanen
Andrew S. Hanen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
—BROWNSVILLE DIVISION—

DORA CISNEROS, Petitioner,	§	
	§	CRIMINAL ACTION NO. B-98-124
VS.	§	
	§	CIVIL ACTION NO. B-02-191
UNITED STATES OF AMERICA, Respondent.	§	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pending before the court is Petitioner's Motion to Vacate or Set Aside Sentence, pursuant to 28 U.S.C. § 2255. For the reasons stated below it is recommended that the motion be denied.

I. Background

The sequence of events which led to the indictment and conviction of Petitioner, Dora Cisneros, ("Cisneros") for capital murder are voluminous and complex. Simply stated, Dora Cisneros hired a hit man, through her association with Maria Martinez, a *curandera* (Mexican folk healer), and her client, Daniel Garza, to murder her teen-age daughter's ex-boyfriend, Joey Fischer, a high school student.

Cisneros was convicted of capital murder in the 357th Judicial District Court, Cameron County, Texas, Criminal Cause No. 93-CR-1515-E, and was

sentenced to life imprisonment. Cisneros appealed the state conviction and on January 25, 1996, the Texas Appeals Court reversed her conviction. *Cisneros v. State,* 915 S.W.2d 217 (Tex.App. – Corpus Christi), *pet. ref'd.,* 935 S.W.2d 789 (Tex.Crim.App. 1996). The state court conviction was overturned because the state court jury was charged in such a way that in order for Dora Cisneros to have been found guilty, she would have had to have hired the killers. The evidence was that she used an intermediary, maria Martinez, to hire the killers.

On February 23, 1998, Cisneros was indicted for the offense of murder for hire in violation of 18 U.S.C. § 1958, Criminal Cause No. B-98-124, in the United States District Court for the Southern District of Texas. On May 12, 1998, after a jury trial, Cisneros was convicted and subsequently sentenced to life imprisonment. Cisneros appealed and the United States Court of Appeals for the Fifth Circuit affirmed the conviction in a published panel opinion. *United States v. Cisneros,* 194 F.3d 696 (5th Cir. 1999). On February 3, 2000, this opinion was vacated and a new panel opinion was issued, affirming the conviction. *United States v. Cisneros*, 203 F.3d 333 (5th Cir. 2000). Then the Fifth Circuit, on its own motion, granted rehearing en banc and consolidated the case with *United States v. Marek,* 198 F.3d 532 (5th Cir. 1999). On January 4, 2001, the en banc court affirmed Cisneros' conviction without additional elaboration on issues presented in the panel opinion. Cisneros' petition for re-hearing was denied. The

Supreme Court denied Cisneros' petition for writ of certiorari on October 1, 2001. *Garcia Cisneros v. United States,* 122 S.Ct. 37 (2001). Cisneros filed the instant motion on September 30, 2002, consisting of ten claims. For purposes of this Court's analysis, Cisneros' claims have been consolidated into four sections.

II. Analysis

A. The Fifth Circuit's En Banc Opinion

Cisneros asserts that she was denied due process of law because the Fifth Circuit did not re-address the following claims in its en banc opinion, which in effect, denied her a meaningful right to appeal: (1) sufficiency of the evidence; (2) insufficient jurisdictional nexus; (3) the district court's submission of inadequate jury instruction on jurisdictional nexus; (4) the district court's refusal to submit a causation instruction; and (5) the district court's refusal to submit statute of limitations instruction.

The Government contends that the en banc court's decision not to re-visit all of the issues, as previously ruled upon by the panel, does not equate to a violation of due process. Cisneros cannot claim that she was denied meaningful review when the appellate courts considered her appeal on four separate occasions. The Government argues that the Fifth Circuit, in its panel opinion, ruled on all five points raised by Cisneros and the en banc court simply affirmed these points without opinion and implicitly

adopted the ruling of the panel. The Government also urges that Cisneros' claims are barred from review by this Court under the law of the case doctrine.

In her 28 U.S.C. § 2255 motion, Cisneros asserts that her judgment and sentence were imposed in violation of the Constitution. Specifically, Cisneros invokes the due process clause of the Fifth Amendment and argues she was denied her right to due process of law and meaningful appeal by virtue of the Fifth Circuit's failure to address her first five points of error. However, Cisneros fails to provide this Court with any authority for the proposition that her disagreement with the method in which the Fifth Circuit framed its en banc opinion rises to a violation of a constitutional right cognizable under § 2255. Neither has Cisneros provided authority for her position that she has a constitutional right under § 2255 to have a district court review an appellate court's prerogative to hear, decide and frame opinions in the most appropriate manner it sees fit. A review, by this Court, of the pertinent case law regarding permissible grounds for attacking sentences under § 2255 finds no authority for Cisneros' claim.

Cisneros argues that the due process clause guarantees her the right to a meaningful review. Although the right to appeal a criminal conviction is not constitutional, but statutory in nature, due process requires that the review be meaningful. *See United States v. Pajooh*, 143 F.3d 203, 204 (5th Cir. 1998). A litigant is entitled to have all issues fully considered by the appellate court. *Id.* However,

meaningful review and the manner in which the appellate court announces its decision are distinguishable. *Id.* Whether a case merits a lengthy opinion, or summary affirmance without opinion, or some other form of summary disposition, is determined on a case by case basis and hinges on the benefit such disposition will have on the bench, bar, or litigants. *Id.*

In this case, although the en banc court did not expressly re-visit all of Cisneros' arguments, her issues nonetheless received full consideration and a ruling. This is apparent from the panel opinions provided on direct review as well as the en banc opinion which clearly concluded with a finding of no error and affirming Cisneros' conviction and sentence. *United States v. Cisneros,* 238 F.3d 310, 323 (5th Cir. 2001). Cisneros has not shown that the en banc court's omission of language reinstating parts of the panel opinions equates to a denial of meaningful review.

The Government has argued that the law of the case doctrine precludes Cisneros from raising issues in the instant motion that were already raised and considered on appeal. The five issues that the en banc court did not re-visit, which form the basis of Cisneros' lack of meaningful review claim, were fully considered and found to be without merit in the first and second panel opinions. *See United States v. Cisneros,* 194 F.3d 626 (5th Cir. 1999) and *United States v. Cisneros,* 203 F.3d 333 (5th Cir. 2000).

Cisneros' motion for relief under § 2255 does not appear to be asking this Court to reconsider the merits of her appellate points of error, but is instead seeking adjudication of a due process claim arising out of the appellate court's election to present its opinion in the manner it which it did. Cisneros has clearly framed her claim around the appellate court's action or inaction and its associated impact on Cisneros' constitutional rights.

In the event that Cisneros is requesting this Court to review the five points of error presented in the appellate court, such request will not be entertained. Cisneros was not denied a meaningful review. Additionally, under the law of the case doctrine, it is well established that when an issue has already been determined on direct appeal, the court need not reconsider it on motion to vacate. *See United States v. Johnson,* 615 F.2d 1125, 1128 (5th Cir. 1980); *United States v. Rocha,* 109 F.3d 225, 229 (5th Cir. 1997). The law of the case doctrine may be applied discretionarily and is subject to three exceptions: (1) the evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice. *United States v. Matthews,* 312 F.3d 652, 657 (5th Cir. 2002).

In this case, the en banc court made no finding of clear error in the panel opinions, in which Cisneros' five issues were reviewed. Cisneros has not demonstrated that she falls within any of the exceptions to

the law of the case doctrine. Cisneros is attempting to obtain review by this Court and possibly the Fifth Circuit, yet again, of the same issues which were found to be without merit on direct appeal from her criminal case. The law of the case doctrine seeks to prevent this back door approach to multiple review of adjudicated issues. This Court will not review the same arguments which have been made and addressed on appeal.

B. The Causation and Required Relationship Instructions

Cisneros asserts that she was denied due process of law under the Fifth Amendment and her right to trial by jury under the Sixth Amendment because the jury was not instructed on: (1) causation, and (2) the required relationship between the foreign commerce and the murder-for-hire scheme.

The Government contends that this issue was addressed in the second panel opinion and found to be without merit. The Government argues that the subsequent affirmance of the conviction by the en banc court, constitutes the law of the case and Cisneros has not shown clear error, nor that the absence of the instruction works a manifest injustice.

As Cisneros has raised these issues pursuant to a § 2255 motion, the threshold inquiry must be whether these issues were previously raised on direct appeal, and if not, whether Cisneros has demonstrated the requisite "cause and prejudice" which would allow

collateral review by this Court. *See United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593 (1982). The analysis below reveals that Cisneros has failed to show cause and prejudice for failing to raise these errors at trial and consequently on direct appeal.

1. The Causation Instruction

The record clearly shows that Cisneros offered an instruction on the elements of the murder-for-hire statute. Cisneros also offered a definition of "causation" as it related to the first element of the murder-for-hire statute. Both instructions were denied by the trial court. The subsequent Fifth Circuit panel opinions found Cisneros' instructions to be incorrect and the trial court's denial proper. Cisneros' proposed *Instruction 15* set forth the first element of the murder-for-hire statute as follows:

> FIRST ELEMENT: That the defendant: (A) caused Heriberto Pizana to travel from Mexico to Brownsville on March 2, 1993, in furtherance of the alleged murder-for-hire; and/or (B) caused Daniel Garza to use a facility in foreign commerce to call Maria Martinez in Brownsville from San Fernando and Matamoros, Tamaulipas, Mexico between November 1992 and February 1993, in furtherance of the alleged murder-for-hire.

Cisneros also submitted *Instruction 15A,* entitled "Causation" which attempted to set forth a definition of causation as it related to the murder-for-hire statute. However, the problem with this instruction, as so aptly identified by the Fifth Circuit, is that it confused the mens rea requirement with correct legal definition of causation as it related to the murder-for-hire statute. *Instruction 15A* read as follows:

> "A person 'causes' another to travel in foreign commerce or to use facilities in foreign commerce if he does an act with knowledge that the foreign travel or use of the facilities in foreign commerce will follow in the ordinary course of business, or where such foreign travel or use of facilities in foreign commerce can be reasonably foreseen, even though not actually intended."

The trial court, during the charging phase of trial, indicated that objections to the final jury charge would be preserved based on any inconsistencies between the actual jury charge and the proposed charges presented by Cisneros. The trial court stated:

> "Now, both sides have kindly favored the Court with requested jury charges. The Court is about to give the charge to the jury this afternoon. Anything that I do that is inconsistent with what you have filed on record, you need not object to. You will preserve your exception. So you need not object to anything that you have already favored me with that I do inconsistent with respect to the charge I give to the jury." 11 R. 1496.

Immediately prior to charging the jury, the trial court advised Cisneros' counsel that he would have the opportunity to raise further objections, not covered by the "running" objection, after the jury had been given their instructions:

> "You will not be precluded from further objections through tomorrow prior to the jury coming in, but just favor the court with any requested additional instructions overnight. Remember, you do not have to object to anything you've already favored me with." 11 R. 1499-1500.

The trial court then provided the parties with a copy of the charge. Counsel for Cisneros acknowledged receipt of the charge:

> "Excuse me, Your Honor. The Court definitely did hand it to me, and I did have about four minutes to look at it. I do appreciate that." 11 R. 1502.

After the jury was charged, the trial court inquired as to the objections thereto:

THE COURT:	Any objection from the Government?
MR. MOSBACKER:	No, Your Honor.
THE COURT:	From the Defendant, knowing well that you preserve everything that I did inconsistent with what you favored me with?

MR. BOTSFORD: Yes, Your Honor, We would respectfully object to the failure of the Court to define under state law the words "intentionally and knowingly" and limit those two definitions under 1.07(a) of the Texas Penal Code to the result of conduct as opposed to the nature of conduct as specified by the Court of Criminal Appeals in numerous cases. 11 R. 1521.

Cisneros' counsel seized the opportunity to object to items in the charge that were not covered by the running objection. Cisneros' counsel made various other objections to items not covered by the running objection, but clearly did not object to the omission of a definition on causation:

MR. BOTSFROD: And, Your Honor, I guess it's my understanding, and I don't mean to object to the Court's – the refusal of the Court to give the requested instructions that we tendered, those are all preserved.

THE COURT: That is correct.

MR. BOTSFORD: Yes, Your Honor.

THE COURT: Any other objections?

MR. BOTSFORD: Your Honor, not at this time. I would like to review my notes overnight, and if before the jury comes back in I have an additional, I will tell –

THE COURT: Do them in writing and favor me with them by 8:30 in the morning.

MR. BOTSFORD: If I have any additional, I shall do that, Your Honor.

11 R. 1522.

When the court reconvened, Cisneros' counsel addressed the court and clarified the objections to the trial court's denial of the proposed instructions, but did not object to the omission of a definition on causation:

MR. BOTSFORD: May I address the Court on one matter on the record for about two seconds. I just wanted to make sure, Your Honor, that after the instructions were read to the jury and the Court asked Mr. Canales and I if we had any additional objections and I said, no we didn't, Your Honor, I didn't want that to be construed as a waiver –

THE COURT: Absolutely not.

MR. BOTSFORD:	– of instructions.
THE COURT:	You had already lodged all of your objections and preserved a record. The only thing only thing I did were the cautionary instructions.
MR. BOTSFORD:	I wanted to, I guess, formally reurge the requested instructions that the Court hadn't given.
THE COURT:	They stand reurged and you have preserved that in toto.

12 R. 1599.

It is undisputed that Cisneros preserved her objections to the trial court's failure to use her proposed jury instructions. But no where on the record, did Cisneros make an objection to the fact that the jury charge did not have a definition of causation as it related to the murder-for-hire statute. Cisneros was given ample opportunity to object orally and in writing after the trial court had charged the jury. A review of the entire record reveals that Cisneros did not object to the omission of a definition of causation. Cisneros merely re-urged her objections to the trial court's decision not to use her proposed instructions. This objection does not equate to an objection to the omission of a definition of causation as it related to the murder-for-hire scheme.

The Fifth Circuit, in both panel opinions, found no error in the trial court's denial of Cisneros' proposed instructions, as they did not reflect the correct law of the Circuit. The Fifth Circuit did not, however, entertain Cisneros' argument as to whether the omission of a definition of causation was violative of due process. Cisneros, in her appellate brief, argued that "[t]he court refused to give the charge and did not charge on causation." "The failure to give the requested charge, which was not otherwise covered by the court's instructions, was harmful in that the jury had no guidance on causation, a key component of the first issue the jury had to consider in ascertaining whether Appellant had committed a crime." *See Appellant's Brief,* Appeal No. 98-40955, p. 41 (Feb. 09, 1999).

Although Cisneros raised the issue of the trial court's omission of a causation definition in her appellate brief, the issue had not been properly preserved for appeal. Both panel opinions appropriately refrained from entertaining Cisneros' argument regarding the omission. The Fifth Circuit's sole reference to the issue is in a footnote in the second panel opinion stating, "we note that the district court failed to give an instruction explaining the notion of causation to the jury". *United States v. Cisneros,* 203 F.3d 333, 347 n. 11 (5th Cir. 2000).

The record thus far has shown that Cisneros objected to the trial court's failure to use her proposed jury instruction, but that Cisneros failed to object to the absence of a definition of causation as it related to

the murder-for-hire statute. The focus now turns to the legal requirements regarding the procedural bar for collateral attacks brought pursuant to § 2255.

To obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) "cause" excusing his procedural default, and (2) "actual prejudice" resulting from the errors of which he complains. *United States v. Frady,* 456 U.S. 152, 168, 102 S.Ct. 1584, 1594 (1982). The proper inquiry, for determining prejudice for alleged errors in a jury charge is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned. *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S.Ct. 1730, 1736 (1977).

This cause and actual prejudice standard presents a significantly higher hurdle than the plain error standard that is applied on direct appeal. *See United States v. Shaid,* 937 F.2d 228, 231 (5th Cir. 1991) (en banc). The application of this rigorous standard ensures that final judgments command respect and that their binding effect does not last only until the next in a series of endless post conviction collateral attacks. *Id.* In an extraordinary case, in which a constitutional violation has probably resulted in the conviction of one who is actually innocent the Supreme Court has recognized a narrow exception to the cause and prejudice test. *See Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 2649

(1986). The Supreme Court has not yet found an appropriate case for the application of this exception, and it has emphasized repeatedly that this exception is limited to "extraordinary" cases involving "manifest miscarriage[s] of justice" that would result in the continued incarceration of one actually innocent of the offense. *See Shaid*, 937 F.2d at 232.

Cisneros, in her § 2255 motion, argues "that cause and actual prejudice have been shown for any procedural default (as reflected elsewhere in this motion in claims relating to ineffective assistance of trial and appellate counsel)" or "that denial of this claims would result in a fundamental miscarriage of justice." *See Cisneros' Motion to Vacate*, n. 41, p. 48. A review by this Court, of Cisneros' arguments pertaining to ineffective assistance of counsel, does not reveal any mention of the cause and prejudice test.

Cisneros offers no cause for failing to object to the trial court's omission of a definition on causation as it related to the murder-for-hire statute. It appears that Cisneros' counsel was given the opportunity to object on at least three occasions and did not. It is unlikely that Cisnoeros' counsel misunderstood the trial judge's admonishment that only objections to the denial of her proposed instructions had been preserved. In fact, the record shows that Cisneros' counsel made objections other than the running objection. In light of this, it is apparent that Cisneros' counsel did not misunderstand what he was required to do in order to preserve an objection that was outside the

scope of the running objection allowed by the trial court.

Likewise, Cisernos offers no showing of the type and extent of prejudice that is required under the law to invoke collateral review of this issue. The applicable standard under *Henderson* is whether the ailing instruction or the omission of the instruction, by itself, so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned. While Cisneros did not meet her burden to demonstrate prejudice, the following analysis shows that Cisneros clearly did not suffer prejudice from the missing definition of causation.

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without due process of law and the Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. *See United States v. Gaudin,* 515 U.S. 506, 509-510, 115 S.Ct. 2310, 2313-2314 (1995). These provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Id.* The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970).

It is firmly established that the murder-for-hire statute, 18 U.S.C. § 1958, consists of three elements: (1) traveling or causing another to travel in interstate or foreign commerce, or using or causing another to use the mail or other facility of interstate or foreign commerce; (2) with intent that a murder be committed in violation of the laws of any State or the United States; and (3) as consideration for the receipt of pecuniary value. *United States v. Sharpe,* 193 F.3d 852, 864 n.6 (5th Cir. 1999). The record shows that the jury was charged on all three of the above elements:

> "For you to find the defendant, Dora Garcia Cisernos, guilty, you must be satisfied of all of the following matters, that all of the following matters have been proven to your satisfaction by proof beyond a reasonable doubt. I'm making reference to all of them. Number one, that she cause another to travel in foreign commerce or cause another to use a facility in foreign commerce." 11 R. 1516.
>
> "In addition to that, that she did that with the intent that the murder of Albert Joseph 'Joey' Fischer be committed in violation of the law of the State of Texas."

11 R. 1516-1517.

> "In addition to that, that as consideration for a promise or agreement to pay, or the receipt of $3,000 in United States currency, the defendant did what she – what it is alleged that she did." 11 R. 1517.

The Supreme Court *in Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730 (1977), a case in which a habeas petitioner challenged jury instructions to which he had not objected at trial, held that the failure to give any explanation beyond the reading of the statutory language itself was not prejudicial. The *Henderson* court noted, "the respondent's burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation beyond the reading of the statutory language itself of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson,* 431 U.S. at 155.

In this case, the jury instructions mirrored the statutory language and referenced all three elements of the murder-for-hire statute. One of the facts, which the murder-for-hire statute requires, is proof that the defendant "caused" another to travel in foreign commerce or "cause" another to use a facility in foreign commerce. As both the panel and the en banc opinions found, the evidence was plainly sufficient to prove that fact beyond a reasonable doubt. *Henderson* stands for the proposition that the jury in this case necessarily made a finding as to causation. There can be no question about the fact that the jurors were informed that the case included a causation issue that they had to decide. The element of causation was stressed in the arguments of both counsel.

MR. PONCE: "Yes, sir. – that Dora Garcia Cisneros *caused* to happen. She *caused* – she *caused* someone to travel from Mexico to the U.S.

The records are there, that vehicle there. You heard from Daniel Garza that throughout this two or three month period, she was on daily – almost on daily contact with Maria Martinez, and a lot of those conversations dealt with what was going to happen and when it was going to get done. And some of those calls were from that village in San Fernando where they used casetas, phone boxes." 12 R. 1541.

MR. CANALES: "All 12 of you must be proven beyond a reasonable doubt as to these three elements. I'm not going to talk about the second and the third. Talk about the first, that the defendant *caused* another to travel in foreign commerce or caused another to use a facility in foreign commerce. 12 R. 1563.

MR. CANALES: "We're not being tried – what we're being tried for anyone to *cause* another to travel in foreign commerce or *cause* another to use any facility in foreign commerce or *cause* another to use any facility in foreign commerce with the intent that a murder be committed in violation of the laws of any state as consideration for the receipt of or as consideration for a promise and so forth." 12 R. 1564.

The statutory language, which the trial judge read to the jury, expressly refers to the requirement that defendant's conduct "caused another to travel in foreign commerce or caused another to use a facility in foreign commerce". Written instructions with the same language were given to the jurors for their use during their deliberations. The trial judge instructed the jury that all elements of the crime must be proved beyond a reasonable doubt. Whether or not the arguments of counsel correctly characterized the law applicable to the causation issue, they surely made it clear to the jury that such an issue had to be decided.

The causation instruction proposed by Cisneros mistakenly confused intent with causation. The Fifth Circuit, in the first panel opinion, discussed the causation issue and provided guidance about the kind of causation instruction that would have been

acceptable. "With respect to causation, *Edelman*[1] requires simple "but for" causation rather than foreseeability . . . ". *United States v. Cisneros,* 194 F.3d 626, 636 (5th Cir. 1999). "Martinez would not have discussed the murder for hire with Garza over the telephone, but for Cisneros' request that Martinez find someone to kill Fischer. The 'in furtherance' requirement is not the law in this circuit. Instead, *Edelman* governs, and it requires that the use of the facility be 'in the commission of the offense.'" *Id.*

Cisneros bears the burden of showing not just the possibility of prejudice from the omission of the instruction, but an actual and substantial disadvantage, infecting her entire trial with error of constitutional dimensions. Cisneros has not met this burden. In light of the holding in *Henderson,* the missing definition of causation in this case was not prejudicial. The jury knew that causation was something they had to decide, based on the trial court's oral charge, the written charge they took with them into deliberations, and trial counsels' closing arguments. The jury was charged on all three elements of the offense as required in *Guadin,* 515 U.S. 506 (1995). Although the "but for" definition of causation, the standard in the Fifth Circuit for § 1958 cases, was not provided, the lack of that further clarification did not prevent the jury from deciding the issue of causation.

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[1] *United States v. Edelman*, 873 F.2d 791, 794 (5th Cir.1989).

The trial court's omission of a definition on causation relating to the murder-for-hire scheme did not create a danger that the jury failed to make an essential factual determination within constitutional requirements that every fact necessary to constitute the crime be proved beyond a reasonable doubt. Such omission did not so infect the entire trial that the resulting conviction violated due process. Cisneros' argument that the jury decided the causation question without adequate guidance and might have rendered a different verdict under proper instructions does not demonstrate the level of prejudice that is clearly required.

Neither has Cisneros made the argument that she is actually innocent. Cisneros has not shown that she fits within the narrow exception to the cause and prejudice test under *Murray v. Carrier,* 477 U.S. 478 (1986). Cisneros has not claimed that she is actually innocent, nor has she demonstrated the requisite cause and prejudice needed to obtain collateral review on this issue.

2. The Required Relationship Instruction

Cisneros argues that there was no instruction that informed the jury about the required relationship between the foreign commerce and the murder-for-hire scheme. Cisneros contends that the jury did not have to find that there was a relationship, which in effect allowed the jury to convict if somebody

traveled in or used a facility in foreign commerce that was *not connected* to the murder-for-hire-scheme.

As Cisneros raises this issue in a § 2255 motion, it must be determined whether the law of the case doctrine bars this Court's review. When an issue has already been determined on direct appeal, a court need not reconsider it on motion to vacate. *See Moore v. United States,* 598 F.2d 439 (5th Cir. 1979); *United States v. Johnson*, 615 F.2d 1125 (5th Cir. 1980); *United States v. Kalish*, 780 F.2d 506 (5th Cir. 1986), cert. denied, 476 U.S. 1118, 106 S.Ct. 1977, 90 L.Ed.2d 660 (1986). The law of the case is not a jurisdictional rule, but a discretionary practice. The doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *United States v. Matthews,* 312 F.3d 652, 657 (5th Cir. 2002) (quoting *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912)). The doctrine has three exceptions: (1) the evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice. *United States v. Becerra,* 155 F.3d 740, 752-753 (5th Cir.1998).

Cisneros previously raised this same argument on appeal. Specifically, Issue No. 3, Subsection B, of Cisneros' appellate brief (entitled "Cisneros' proposed instruction regarding the jurisdictional element") tracks the same argument submitted in the instant

motion. Referring to the jury charge of the murder-for-hire statute, Cisneros stated:

> "The above quoted language allowed the jury to convict Cisneros if 'somebody . . . involved' traveled in or used a facility of foreign commerce regardless of the activity's connection to the murder. In fact, it affirmatively allowed the jury to convict even if the foreign commerce facilities were not used in connection with the murder. The charge therefore constructively amended the indictment and allowed Appellant to be convicted for conduct not charged in the indictment." *Appellant's Brief,* Appeal No. 98-40955, p. 32.

In her §2255 motion Cisneros makes the same argument. Cisneros claims that the jury was not instructed or alternatively not adequately instructed on whether the foreign commerce had to "facilitate" or "be in furtherance" of the alleged murder for hire scheme. In support of this claim, Cisneros states:

> "The language of the District Court's actual instruction to the jury allowed the jury to convict Cisneros if 'somebody . . . involved' traveled in or used a facility in foreign commerce regardless of the activity's connection, if any, to the alleged murder for hire scheme. In fact, it affirmatively allowed the jury to convict even if the foreign commerce facilities were not used in connection with the murder for hire scheme." *See Cisneros' Motion to Vacate,* p. 57.

Although Cisneros' appellate point and collateral claim are titled differently, Cisneros is raising the same argument. In response to this argument, the Fifth Circuit in the first panel opinion stated:

> "Cisneros first sought to instruct the jury that the interstate/foreign commerce connection had to have been 'in furtherance' of the murder-for-hire. Because this instruction is taken from the First Circuit's decision in *United States v. Houlihan,* 92 F.3d 1271, 1292 (1st Cir.1996), rather than our decision in *Edelman,* it is neither the law in this circuit nor substantially correct. The court's refusal was appropriate. The court instead explained to the jurors that to find Cisneros guilty, they had to determine: 'Number one, that [Cisneros] caused another to travel in foreign or interstate commerce or caused another to use a facility in foreign commerce' to find Cisneros guilty. By setting out the causation requirement this clearly, the court established that use of such a facility would have to be the result of Cisneros's actions, and therefore in the commission of the offense charged." *United States v. Cisneros,* 194 F.3d 626, 638 (5th Cir. 1999).

Likewise, the second panel of the Fifth Circuit addressed Cisneros' claim of error:

> "Cisneros first sought to instruct the jury that the use of the facility in foreign commerce had to have been 'in furtherance' of the murder-for-hire. As we have previously observed, 'in furtherance' is not the requirement in this

> circuit; 'facilitated' or 'made easier' is. *Garrett,* 716 F.2d at 266. That is, Garza's calls need not have been made for the purpose of furthering the murder-for-hire. It is enough that those calls facilitated the scheme incidentally, or by mere happenstance. *Id.* at 265-66. Here, it may well be true that Garza did not place the calls 'in furtherance' of the murder-for-hire scheme. He called Martinez for marital advice. Martinez was the one who would bring up the subject of the Fischer murder. But those international calls gave Martinez the opportunity to pursue her earlier requests that Garza arrange the murder. In that sense, they facilitated the murder, even though the use of the telephone across national boundaries was purely incidental. The difference between 'in furtherance' and 'facilitated,' therefore, can be significant. For that reason, Cisneros's proposed instruction was not substantially correct, and the district court's failure to give it does not constitute reversible error." *United States v. Cisneros,* 203 F. 3d 333, 345-46 (5th Cir. 2000).

Cisneros objected to and raised on appeal the trial court's denial of her instruction on the "jurisdictional element", also referred to as the "in furtherance", "required relationship", or "foreign nexus requirement" instruction. This issue was addressed by the Fifth Circuit in both panel opinions and found to be without merit. Cisneros has not shown that her claim fits within the exception to the law of the case doctrine, i.e. that the earlier

decision is clearly erroneous and would work a manifest injustice. This Court, in its discretion, following the vernacular of the Supreme Court in *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739 (1912), refuses to reopen what has been decided.

Cisneros attempts to avoid the law of the case doctrine by urging that this issue has not been determined on direct appeal because the panel opinions were vacated by the en banc court. Cisneros asserts no authority on this point. "Determined" or "raised and reviewed" does not equate to a full written opinion from the en banc court on all issues previously decided by the panel opinions. Cisneros raised the issue on appeal and the Fifth Circuit reviewed it. Cisernos has not provided authority for her proposition that meaningful review requires an en banc court to re-address all points previously reviewed in a panel opinion, or specifically re-instate parts of the panel opinions. It is clear that Cisneros' "in furtherance" or "nexus requirement" instruction has been raised and reviewed on direct appeal and on rehearing on at least three occasions.

As to Cisneros' argument regarding the omission of an instruction on the nexus requirement, this Court finds it is not within its purview to address, as no contemporaneous trial objection was made. The trial transcripts reveal that Cisneros failed to object to the omission of an instruction on the nexus requirement, other than her running objection regarding the denial of the proposed nexus instruction. A review of Cisneros' appellate brief reveals that she

only raised on appeal the denial of her proposed "in furtherance" instruction, but did not raise the issue of the trial court's omission of a nexus instruction.

The Fifth Circuit, in its second panel opinion noted the missing instruction, but did not make any findings with respect thereto, as the issue had not been preserved. "We note that the district court gave no instruction on the nexus requirement." *United States v. Cisneros*, 203 F.3d 333, n.9 (5th Cir. 2000). Cisneros clearly points out the fact that the omission of the instruction on the "nexus requirement" was not raised on direct appeal. "The failure to submit any instruction on what the jury had to find before it could find that the foreign commerce was sufficiently related to the murder for hire scheme was raised in Cisneros' motion for rehearing from both vacated panel opinions, as well as in her en banc supplemental brief, but the utter failure to have the jury instructed on this jurisdictional elements of the offense *was not addressed* by either panel or the en banc Court." *See Cisneros' Motion to Vacate*, n. 50, p. 59 (emphasis added).

As Cisneros is raising the lack of a nexus requirement instruction for the first time on appeal, to which no contemporaneous trial objection was made, Cisneros must demonstrate the requisite cause and prejudice in order to obtain review by this Court. Cisneros has failed to meet this burden. Cisneros argues simply that, "this issue is sufficiently preserved, but if the government takes a contrary position, Cisneros asserts that 'cause' and actual

'prejudice' have been shown for any procedural default (as reflected elsewhere in this motion)." *See Cisneros' Motion to Vacate*, n. 50, p. 59. The reference to the location of Cisneros' argument on this point is vague at best. A review of the motion to vacate does not reveal Cisneros' grounds demonstrating cause and prejudice. Cisneros has also failed to show that she meets the "actually innocent" exception to the procedural bar on this point. Therefore, the issue of whether the omission of the nexus requirement instruction violated Cisneros' due process rights, is not reviewable by this Court.

C. Government's Alleged Failure to Disclose Witness' Modified Testimony and Alleged Use of Perjured Testimony

Cisneros asserts that the government abrogated her right to fair trial by failing to disclose Garza's purported modification of his testimony, as well as the use of perjured testimony. Specifically, Cisneros argues that the Government suppressed evidence favorable to the accused in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963) by not disclosing the sequence of events surrounding Daniel Garza's modification of his testimony, as reflected in the differences between his statements to the FBI and his testimony at the capital murder trial.

The Government argues that Cisneros' *Brady* claim was not raised on direct appeal and Cisneros

has failed to demonstrate the requisite "cause and prejudice" necessary for the Court to review the claim in a habeas proceeding. Cisneros, in her reply to the Government's answer, argues that "cause for her failure to [raise the issue earlier is] found in the Government's ongoing violation of its duty to reveal *Brady* material and trial counsel's deficient performance. Prejudice is demonstrated by the materiality of the suppressed evidence." *See Cisneros' Reply to Respondent's Answer*, p. 7.

Cisneros sets forth two separate grounds for demonstrating cause. The first alternative consists of trial counsel's deficient performance. Ineffective assistance of counsel is cause for a procedural default. *United States v. Pierce,* 959 F.2d 1297, 1301 (5th Cir.), cert. denied, 506 U.S. 1007, 113 S.Ct. 621, 121 L.Ed.2d 554 (1992). However, the fact that counsel failed to recognize a factual or legal basis for a claim, or failed to raise a claim despite recognizing it, does not constitute cause for a procedural default. *See Murray v. Carrier,* 477 U.S. 478, 106 S.Ct. 2639 (1986). Counsel's performance, in failing to raise the claim, must be constitutionally ineffective under the standard established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In this case, Cisneros merely states that trial counsel's deficient performance demonstrates cause for her procedural default. There is no further argument to support this contention. There is no showing that counsel's failure meets the *Strickland* standard. In fact, Cisneros makes an assertion to the contrary

and states, "[t]rial counsel, in any event, was very diligent in making requests that should have led to the release of these facts." *Cisneros' Reply to Respondent's Answer,* p. 8. "Trial Counsel thoroughly sought the very information Cisneros alleges has remained suppressed by filing multiple, interrelated, pretrial motions . . . ". *Id.* Therefore, Cisneros has not established cause for her procedural default arising from ineffective assistance of counsel.

Cisneros' alternate theory for demonstrating cause is the Government's purposeful suppression of information regarding the change in Garza's testimony, i.e. an objective factor external to the defense impeded counsel's efforts to raise this issue on appeal. Cisneros contends that cause for her procedural default is obvious due to the nature of this particular claim and argues that the "facts themselves remain suppressed, however, and 'good cause' is shown for discovery to release them." *Cisneros' Reply to Respondent's Answer,* p. 7.

A review of the record indicates that there was no new information regarding Garza's inconsistent testimony that would have triggered Cisneros to raise this issue for the first time in a motion to vacate, that could not have been raised on appeal. All the grounds that Cisneros lists in her motion to vacate which support her due process argument, existed at the time of her appeal. In fact, no new information has been divulged by the Government which would have allowed Cisneros to discover this new claim. Cisneros, in her motion to vacate, lists several sources of

information that show Garza's alleged "gross modification" of his testimony. The following information was available to Cisneros at trial, at the close of trial and on appeal. It has not been changed or expanded since that time and was certainly available to Cisneros on appeal:

1. Three page statement made by Garza, taken by Deputy Sheriff Alex Perez on March 1, 1993 (regarding calls from Garza to Martinez from San Antonio and Brownsville).

2. Garza's testimony in the state court case on March 9, 1994 (regarding calls from Garza to Martinez from San Antonio).

3. Martinez's testimony in the state court case (regarding calls received from Garza from Dallas and San Antonio).

4. Memorandum of Interview (FBI 302) dated June 28, 1996, with Garza (no calls were mentioned).

5. Memorandum of Interview (FBI 302) dated August 29, 1996, with Martinez (Garza called Martinez on numerous occasions, but no information about location of Garza).

6. Letter from Garza to Government, dated September 30, 1996 (regarding his willingness to assist as a witness in the federal case).

7. Memorandum of Interview (FBI 302), dated November 22, 1996, with Garza (no calls were mentioned).

8. Letter from Garza to Government, dated December 9, 1996 (regarding his willingness to assist as a witness in the federal case).

9. Memorandum of Interview (FBI 302) dated January 28, 1998, with Martinez (regarding Garza's collect calls from Dallas and San Antonio and unawareness of calls from Mexico).

10. Memorandum of Interview (FBI 302), dated February 5, 1998 (regarding Garza's collect calls to Martinez).

11. Memorandum of Interview (FBI 302), dated February 18, 1998 (regarding Garza's collect calls to Martinez between September and November 1992).

12. Cisneros' defense counsel interview with Garza on February 18, 1998 (Garza could not recall calling Martinez from Mexico).

13. Government's Bill of Particulars, dated April 20, 1998 (indicating calls from Garza to Martinez from Matamoros and San Fernando, Mexico between November 1992 through February 1993).

14. Discovery of the Government's telephone records of Martinez received on April 24, 1998 (showing no collect calls from Mexico to Martinez).

Cisneros sets forth a full argument (roughly 27 pages) regarding the Government's violation of *Brady* based on the discovery listed above. Cisneros, in connection with her motion to vacate, filed a motion

for discovery, claiming that interrogatories, depositions and paper evidence would lead to further proof of her claim. Cisneros' request for discovery was denied, by written order on May 16, 2005.

The information upon which Cisneros bases her *Brady* claims in this motion, is the same information that was available to Cisneros at the time of her appeal. Cisneros was given the opportunity to cross examine Garza during the trial. By Cisneros own admission, defense counsel "failed to seek an explanation from the government or the District Court regarding Garza's gross modification of his story." *Cisneros' Motion to Vacate,* p. 82-83. Even though Cisneros was aware of the modification, as evidenced by Cisneros attempt to impeach Garza by calling FBI Agent Church to testify, trial counsel did not seek an explanation from Agent Church regarding Garza's modified testimony. It appears that Cisneros' trial counsel was aware of the modified testimony before trial and during trial. Cisneros has not shown good cause for failing to raise a *Brady* claim at trial or on appeal.

In the event that Cisneros has demonstrated cause, Cisneros has failed to show actual prejudice. Cisneros is required to demonstrate that defense counsel's failure to object or raise a *Brady* claim at trial, resulted in an actual and substantial disadvantage, which infected her entire trial with error of constitutional dimensions. To support this Cisneros argues that the Government allowed Garza to create a false impression before the jury on the use of the

foreign telephone facilities and that Cisneros's counsel was unable to effectively impeach Garza's credibility on the issue of whether the foreign telephone conversations took place. Cisneros contends that knowledge of when Garza changed his story would have enabled her to more effectively advance her defense. Specifically, Cisneros states that she was deprived of her right and ability to:

> (1) "develop the sequence of events that surrounded Garza's change from [his interview statements that] calls from Matamoros, Mexico, which were collect calls, to his trial testimony (i.e. calls to Martinez from Matamoros and San Fernando, made from casetas, not collect calls)"; and
>
> (2) "develop the sequence of events that surrounded Garza's change from [his interview statements that] calls to Martinez from Mexico occurred between September and November 1992, a time frame that clearly predated the point in time that Martinez told him that the client wanted Fisher killed, to late 1992 or early 1993, a time frame possibly including calls after Martinez told him that the client wanted Fischer killed in late January." *Cisneros' Motion to Vacate*, p. 85.

A *Brady* violation consists of three elements: (1) the evidence was suppressed; (2) the evidence was favorable to the accused; (3) evidence was material to guilt or punishment. *Jackson v. Johnson,* 194 F.3d 641, 648 (5th Cir. 1999). Evidence is material only if there is a reasonable probability that, had the

evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine confidence in the outcome." *Id.* at 649-50.

Cisneros fails to meet the third element of a *Brady* violation, i.e. Cisneros has not shown that the evidence of "*when* Garza modified his testimony" is material. Cisneros' argument that knowing when Garza modified his testimony would have helped her to more effectively advance her defense and attack Garza's credibility, does not demonstrate that the result of the proceeding would have been different.

The record reveals that Cisneros became aware of the modified testimony when she received the Government's Bill of Particulars and again during trial, but chose not to cross examine Garza more fully on this issue. However, it was obvious to the jury that there was a change in Garza's testimony, as evidence by his direct examination at trial:

Q: Do you recall whether or not you told them [FBI Agents Church or Vela] that any phone calls you made to Maria Martinez from Mexico were collect?

A: The truth, the truth, I don't remember exactly because I would pay for the calls.

Q: You had – well, if these agents wrote a report that says that you told them that you always made collect calls, you think they made a mistake when they interviewed you?

A: There may be a mistake because if I called, maybe I called once collect.

Q: All right. So can we agree that whatever times you called from Mexico to Maria Martinez, it was only one time, is that correct.

A: Collect, that is correct. 11 R 1398-99.

There are numerous possible explanations for the change in Garza's testimony, including but not limited to the accuracy of Garza's memory, FBI Agents' misunderstanding of the Spanish term "casetas", or Garza's confusion as to relative terms such as "public" calls, "collect" calls, "credit card" calls. These explanations could have been brought out by Cisneros' counsel on cross examination and would have only affected Garza's credibility in the eyes of the jury.

The jury was obviously aware that there was inconsistencies between Garza's previous statements and his trial testimony. The jury could have relied on testimony from the other trial witnesses to find that a facility in foreign or interstate commerce was used or that there was travel in interstate or foreign commerce. Cisneros' failure to raise a *Brady* claim did not infect the entire trial with error. Even if Cisneros had knowledge of when Garza modified his testimony, and more thoroughly cross examined Garza, it would not have ensured a finding of not guilty. The credibility of but one witness in the context of the whole trial, does not rise to the level of prejudice required to allow this Court to collaterally review Cisneros' conviction.

Likewise, Cisneros has not demonstrated the requisite prejudice with respect to her claim that the Government allegedly used perjured testimony (*Napue*[2] violation). Similar to the elements of a *Brady* violation, Cisneros must show that the Government knowingly used false or perjured testimony which "material" to the conviction. *Blackmon v. Scott,* 22 F.3d 560, 565 (5th Cir. 1994). Under the cause and prejudice test, Cisneros must also demonstrate that her failure raise a Napue violation resulted in the requisite prejudice.

To support her contention that the false testimony was "material", Cisneros argues, "[a]ssuming, arguendo, that Garza's testimony was false and that the government well knew it, there could be no question that relief should be granted since it went to one of the two critical jurisdictional bases upon which the jury had to base its decision." *Cisneros' Motion to Vacate,* p. 92-93. Cisneros, in a footnote, states the appropriate standard for materiality:

> "The materiality standard required to also meet the prejudice standard (for procedural default) is whether there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Strickler,* 527 U.S. at 289." "The touchstone

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[2] *Napue v. Illinois*, 360 U.S. 264, 269-70, 79 S.Ct. 1173, 1177-78 (1959) (government must not deliberately use perjured testimony or encourage the use of perjured testimony).

> of this inquiry is whether the evidentiary suppression would undermine this Court's confidence that the fact finder would have reached the same result. *Strickler,* 527 U.S. at 300-01." *Cisneros' Reply to Respondent's Answer,* n. 14, p. 13.

Although Cisneros sets forth the correct definition of materiality and prejudice, nowhere in her reply does she show how this definition applies to Garza's testimony and Cisneros' conviction. Cisneros merely refers to the *Government's Answer* and states that the Government concedes prejudice:

> "The Government essentially concedes that, if discovery were to reveal that Garza's testimony about either (1) the dates when he allegedly made calls to Cisneros, or (2) the places (casetas) from which he made the calls was fabricated, *prejudice would be shown*". *Cisneros' Reply to Respondent's Answer,* p. 13. (emphasis added).

Cisneros tries to conclude that if the first two elements are shown (i.e. knowing use of false testimony), then prejudice necessarily exists. This is not the test. In order to demonstrate materiality and overcome the prejudice hurdle, Cisneros must specifically show how, in her particular case, the Government's non-disclosure placed the case in a different light so as to undermine confidence in the verdict. *See Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 1566 (1995). Merely re-stating the definition, as Cisneros has done, is not sufficient.

Cisneros has the burden of applying the definition to the facts of her case, in light of the entire trial, and demonstrating that had the government disclosed Garza's perjured testimony, there existed a reasonable probability that the jury would have found Cisneros not guilty of murder-for-hire pursuant to 18 U.S.C. § 1958. This type of showing essentially requires Cisneros to delve into the entire record, consider the jury's province to determine witness credibility, and establish that, absent the alleged perjured testimony, as to the dates and locations of the phone calls, the jury would probably not have convicted Cisneros under either prong of the murder-for-hire statute. This, Cisneros has not done. Cisneros has not met the burden of establishing prejudice sufficient to overcome the hurdle to collateral review in this Court.

D. Ineffective Assistance of Trial and Appellate Counsel

1. Trial Counsels' Performance

Cisneros claims that her Sixth Amendment right to effective assistance of counsel was violated when her trial counsel: (1) failed to object to transcripts of conversations between Daniel Garza and Maria Martinez; (2) failed to develop testimony during cross examination of Maria Martinez that she was aware of the fact that Garza called her from Dallas and San Antonio, but not from Mexico; (3) inadequately cross examined Daniel Garza; (4) failed to elicit testimony

tending to demonstrate inconsistencies in Daniel Garza's testimony; (5) failed to request an instruction requiring the jury to find the telephone calls from Mexico were sufficiently related to the murder for hire scheme to support the jurisdictional element of 18 U.S.C. § 1958; and (6) failed to adequately request an instruction on causation.

The Government argues that Cisneros has not shown that counsel's performance was deficient, nor that counsel's errors were so serious as to deprive the defendant of a fair trial, under the *Strickland* standard.

In this case, Cisneros bears burden of showing by preponderance of evidence that she was deprived of her right to effective assistance of counsel. *See Clark v. Johnson*, 227 F.3d 273 (5th Cir. 2000). Cisneros must demonstrate that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 104 S.Ct. 2052, 2064 (1984). There is a strong presumption that counsel was competent. *See id.* at 689, 104 S.Ct. 2052. Judicial scrutiny of counsel's performance must be highly deferential. *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002), overruled on other grounds by *Tennard v. Dretke,* 542 U.S. 274, 124 S.Ct. 2562 (2004).

As to the deficient performance prong, Cisneros must show that counsel's performance was objectively unreasonable. *Strickland* at 688, 104 S.Ct. 2052. Decisions as to whether or not to call certain

witnesses to stand, whether to ask or refrain from asking certain questions, and the like, are tactical determinations, and errors, even egregious ones, do not provide basis for post conviction relief. *United States v. Rubin,* 433 F.2d 442 (5th Cir. 1970). Defense counsel's conscious and informed decision on trial tactics and strategy is not a permissible basis for a claim of ineffective assistance of counsel. *Green v. Johnson,* 116 F.3d 1115, 1122 (5th Cir.1997). So long as counsel made an adequate investigation, any strategic decisions made as a result of that investigation fall within the wide range of objectively reasonable professional assistance. *Moore v. Johnson,* 194 F.3d 586, 591-92 (5th Cir.1999).

As to the prejudice prong, Cisneros must show a reasonable probability that the result of the proceedings would have been different but for counsel's unprofessional errors. *Crane v. Johnson,* 178 F.3d 309, 312 (5th Cir.1999). The mere possibility of a different outcome is not sufficient to prevail on the prejudice prong. *Id.* Rather, the defendant must demonstrate that the prejudice rendered sentencing fundamentally unfair or unreliable. *Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S.Ct. 838 (1993).

In her § 2255 motion, Cisneros claims that her trial counsel was ineffective for (1) failing to object to transcripts of conversations between Daniel Garza and Maria Martinez; (2) failing to develop testimony during cross examination of Maria Martinez that she was aware of the fact that Garza called her from Dallas and San Antonio, but not from Mexico; (3)

inadequately cross examining Daniel Garza; (4) failing to elicit testimony tending to demonstrate inconsistencies in Daniel Garza's testimony; (5) failing to request an instruction requiring the jury to find the telephone calls from Mexico were sufficiently related to the murder for hire scheme; and (6) failing to adequately request an instruction on causation.

Failing to object to admission of certain evidence, failing to adequately develop witness testimony, failing to adequately cross examine, and failing to request a jury instruction are within the realm of tactical determinations and do not constitute objectively unreasonable performance under *United States v. Rubin,* 433 F.2d 442 (5th Cir. 1970). A review of the trial transcript reveals that the alleged deficiencies were the result of conscious and informed decision making on trial tactics and strategy. Examining trial counsel's perspective at the time of trial, without the distorting effects of hindsight, clearly result in the conclusion that counsel's conduct falls within the wide range of reasonable professional assistance.

2. Appellate Counsels' Performance

Cisneros also claims that her right to effective assistance of counsel on appeal was violated when her appellate counsel: (1) failed to challenge the propriety of the district court's foreign commerce instruction; (2) failed to raise the issue of causation; and (3) failed to raise misconduct occurring before the jury.

The Supreme Court in *Evitts v. Lucey*, 469 U.S. 387, 396 105 S.Ct. 830, 836 (1985), held that due process requires effective assistance of counsel on appeal. However, counsel does not have a duty to raise every colorable claim suggested by a client. *Jones v. Barnes*, 463 U.S. 745, 754 103 S.Ct. 3308, 3314 (1983). The proper standard for evaluating ineffective assistance on appeal is that set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See Smith v. Murray*, 477 U.S. 527, 535-536, 106 S.Ct. 2661 (1986). Therefore, in order for Cisneros to be successful on this claim, she must demonstrate that: (1) counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them; and (2) there is a reasonable probability that, but for counsel's unreasonable failure, Cisneros would have prevailed on her appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 120 S.Ct. 746, 764 (2000).

a. Failure to Challenge the Required Relationship Instruction

Cisneros contends that appellate counsel failed to challenge (or adequately challenge) on appeal the "required relationship" instruction. Cisneros raised this point on appeal as Issue No. 3, Subsection B, entitled "Cisneros' Proposed Instruction Regarding the Jurisdictional Element". This issue was addressed by the Fifth Circuit in both panel opinions and found to be without merit. In reviewing Cisneros' appellate argument on this point, it appears to be a non-frivolous, thoroughly briefed appellate point.

There is no hint of any deficient performance on behalf of appellate counsel. In fact, the same language is used in Cisneros' §2255 motion, prepared by her appellate counsel, thereby belying her assertion that counsel was ineffective on this point. If Cisneros believed that appellate counsel was ineffective in drafting the argument on appeal, then Cisneros would most likely not have allowed the same counsel to replicate the same argument in the instant § 2255 motion. Cisneros has failed to meet the first prong under *Strickland*. To the extent that Cisneros claims appellate counsel was ineffective for failing to object to the omission of a required relationship instruction, Cisneros failed to object at trial and preserve this issue for appeal, therefore appellate counsel was barred from raising it.

b. Failure to Challenge the Omission of the Causation Instruction

Cisneros argues that appellate counsel failed to challenge on appeal the lack of a "causation" instruction. As set forth in Part II., Subpart B., Section 1, of this opinion, Cisneros did not object to the omission of the causation instruction and had not preserved this error for appellate review. Cisneros' appellate counsel could not have raised this issue even if he wanted to. Although, a review of Cisneros' Appellate Brief reveals that the issue was raised on direct appeal, it was not addressed by the appeals court because it had not been preserved. Assuming arguendo, that trial counsel had preserved this error, and appellate

counsel unreasonably failed to raise it, the appeals court would probably not have found error, in light of the holding in *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730 (1977) (missing definition of causation is not prejudicial as the jury knew that causation was something they had to decide, based on the charge and closing arguments). Cisneros fails to demonstrate both prongs of ineffective assistance of appellate counsel under *Strickland.*

c. Failure to Raise Prosecutorial Misconduct

Cisneros argues that appellate counsel failed to raise on appeal the improper overruling of Cisneros' motion to dismiss the indictment due to prosecutorial misconduct before the grand jury. In order to obtain relief on this claim, Cisneros must demonstrate prejudice under *Strickland,* i.e. that had this issue been raised on appeal, there is a reasonable probability that, but for counsel's unreasonable failure, Cisneros would have prevailed. Assuming it was unreasonable for Cisneros' appellate counsel not to raise this issue on appeal, Cisneros has not shown the requisite prejudice.

During her criminal trial, Cisneros filed a motion to dismiss the indictment, seeking to invoke the supervisory power of the trial court to dismiss indictment based on the prosecutor's abuse of grand jury subpoena power in violation of FED. R. CRIM. P. 6 and sponsorship of false testimony by Agent Church.

The supervisory power of a district court can be used to dismiss an indictment on grounds of non-constitutional prosecutorial misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress". *See United States v. Williams*, 504 U.S. 36, 46, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (quoting *United States v. Mechanik*, 475 U.S. 66, 74, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring in the judgment)). Rule 6 of the Federal Rules of Criminal Procedure contains a number of such rules. *Id.*

The Supreme Court in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369 (1988), held that a court, invoking its supervisory power, may not dismiss an indictment absent a showing of prejudice. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. *Id.* at 263, 2378. However, in cases in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, prejudice is presumed. *See Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946) (exclusion of women from grand jury).

(1) Violations of Rule 6

Cisneros contends that the prosecutor for the Government violated FED. R. CRIM. P. 6 by abusing grand jury subpoena power, conducting his own independent investigation, making improper disclosures, and grand jury forum shopping. Cisneros argues that the United States Attorney, Mr. Mosbacker, issued three subpoenas[3], returnable to the Brownsville Grand Jury (two for the telephone records of Maria Martinez and Daniel Garza and one for the appearance of Agent Church), on his own authority because "there was no grand jury in Brownsville *investigating* Cisneros." *Cisneros' Motion to Vacate,* p. 170 (emphasis added). Mr. Mosbacker then transferred the case to Houston, where the grand jury returned the indictment.[4] Cisneros contends that at least some of the subpoenas were made returnable to the Brownsville grand jury, but were instead returned to the Houston grand jury, thereby utilizing two grand juries. Cisneros's arguments before the trial court were as follows:

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[3] These subpoenas were submitted as Defendant's Exhibits 28, 28A and 28B during the Pre-Trial Hearing on April 27, 1998. Exhibit 28 consisted of a subpoena issued by United States Attorney, Mervyn Mosbacker to Southwestern Bell, returnable to Brownsville, Texas. Exhibit 28A also consisted of a subpoena issued by United States Attorney, Mervyn Mosbacker to Southwestern Bell, returnable to Brownsville, Texas.

[4] The heading on the indictment (Docket No. 1) in Criminal Case No. B-98-124, states United States District Court for the Southern District of Texas, **Brownsville Division**.

MR. CANALES: What I am saying, Judge, part of our motion that the Court is looking at, I am accusing the Government of Grand Jury shopping. The Grand Jury has violated Rule 6(e).

THE COURT: Let's go at it this way. As you well know, there is no question they can go to any Grand Jury throughout the district to seek an indictment. The question is – and I so rule, absent you showing me something else. The question is, did you use the Grand Jury in Houston. And I gathered that you are attacking the composition or the constitution of the Grand Jury that was used in this case, which was not a Brownsville Grand Jury, is that right?

MR. MOSBACKER: That is right.

THE COURT: That's what you are addressing?

MR. CANALES: No, Judge.

THE COURT: What is it that you are addressing?

MR. CANALES: What I am addressing is, I have here exhibits that will

reflect that this investigation was being conducted, led by Mr. Mosbacker, investigating Ms. Cisneros, Grand Jury subpoenas were utilized out of the Grand Jury sitting in the Brownsville Division in the Southern District of Texas. Now, that Brownsville Grand Jury did not get to vote. The indictment was not presented to it. It was presented to another Grand Jury in Houston, Texas. They are utilizing two Grand Juries in this particular case. I do not know what happened where or how, but I know one thing, that I have asked and I have not seen any type of orders from this Court authorizing the Government to be able to use two Grand Juries to investigate this matter or receive information from one Grand Jury, transcripts of another Grand Jury, and all is prohibited by Rule 6(e)(3)(c)(3)(ii). And it says that while he is authorized to make a disclosure to another Grand Jury, he must get Court permission. And I

submit to the Court that I have here exhibits, Grand Jury exhibits, of Grand Jury subpoenas, where they are utilizing two Grand Juries. How do I know perhaps he received information from this Grand Jury and got no billed and he took it somewhere else and they get a bill. They cannot do that, Your Honor. So that's the reason I am trying to find out what happened in Houston as to what happened here. And our motion goes to that. I do not know –

THE COURT: You had two Grand Juries working on this case?

MR. MOSBACKER: Your Honor, we had subpoenas issued returnable to the Brownsville Grand Jury. And, in fact, at least one of those subpoenas –

THE COURT: My question is, did you have a Brownsville Grand Jury looking into this case?

MR. MOSBACKER: No, Your Honor. Did not receive any testimony in this case.

THE COURT: They did not investigate this case?

MR. MOSBACKER: No, You Honor.

THE COURT: Your representation is that is was investigated by a Houston Grand Jury?

MR. MOSBACKER: Your Honor, it was presented to the Houston Grand Jury, including returns of at least one of the subpoenas that was issued to the Brownsville Grand Jury. It was transferred to Houston.

THE COURT: Why would a Brownsville Grand Jury ask for a subpoena, seek a subpoena, if they weren't investigating the case?

MR. MOSBACKER: Your Honor, the Assistant United States Attorney, which was me in this case, issued the subpoena.

THE COURT: Not the Grand Jury?

MR. MOSBACKER: That is correct, Your Honor.

4 R. 24-27

Generally, Rule 6(e) governs the secrecy and disclosure of grand jury proceedings. Subsection (e)(2)(B) provides that matters occurring before the grand jury may not be disclosed, however, subsection (e)(3) provides a list of exceptions to that rule, including disclosure to another federal grand jury. Rule 6(e)(3)(E)(i) enables the court to authorize disclosure

of a grand jury matter preliminarily to or in connection with a judicial proceeding. Further, Rule 6(e)(3)(F) sets forth the manner by which such a disclosure may be obtained from the court:

> "(F) A petition to disclose a grand jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex-parte – as it may be when the government is the petitioner – the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:
>
> (i) an attorney for the government;
>
> (ii) the parties to the judicial proceeding;
>
> (iii) any other person whom the court may designate.

As to the allegation that the Government was grand jury shopping, there is nothing under the law which prevents the United States Attorney from seeking an indictment in any division in the Southern District. As to the allegation that the disclosure of Brownsville Grand Jury matters to the Houston Grand Jury was violative of Rule 6, the rule does not require the petitioner to serve the disclosure order on defense counsel at the time of issuance. Mr. Mosbacker, the United States Attorney in the underlying criminal case, filed a disclosure order pursuant to Rule 6. Although at least some of the subpoenas issued by Mr. Mosbacker were made returnable to the Brownsville Grand Jury, the information received

was then disclosed to the Houston Grand Jury in accordance with Rule 6.

MR. CANALES: The next thing, Your Honor, in that regard, we again request the Court to order the Government to provide me a copy for the purposes of this hearing of the Government's disclosure under Rule 6. They informed us day before yesterday in open court that they had filed some type of a disclosure order. Request for the Court, the Court denied me at that time my request, and we are renewing our request. If the Court refuses to provide us a copy of that, we ask that the Court attach it under seal for the purpose of the record.

THE COURT: The disclosure of what?

MR. CANALES: Mr. Mosbacker informed me that he filed a 6(e) disclosure form with the Court. That is, people he had disclosed information from the Grand Jury. I would like to get a copy of that request that he filed. He will not give it to me.

THE COURT: Favor the Court with it. Have you done that?

MR. MOSBACKER: Your Honor, we will do that.

THE COURT: You do that.

5 R. 3-4

As to Cisneros' allegation that an United States Attorney cannot issue a grand jury subpoena for the purposes of conducting his own investigation, she cites in support thereof *Durbin v. United States,* 221 F.2d 250, 522 (D.C. Cir. 1954). In *Durbin,* The United States Attorney issued a subpoena whereby Mr. Durbin was directed to the Office of the U.S. Attorney and questioned by the United States Attorney and FBI Agents, but not the grand jury. The D.C. Circuit Court held that it was improper for the United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition.

In this case, Mr. Mosbacker issued the subpoena on behalf of the Grand Jury sitting in the Southern District, presumably the Brownsville Division. The subpoenas requested phone records and the presence of FBI Agent Church. It appears that some of the phone records were returned to the Brownsville Grand Jury (later disclosed to the Houston Grand Jury) and some were returned to the Houston Grand Jury. The record reflects that Agent Church testified before the Houston Grand Jury. Therefore, Mr. Mosbacker did not abuse grand jury subpoena power to conduct his own investigation, as the documents and

testimony were ultimately presented to the Houston Grand Jury, who returned the indictment. It is immaterial that the grand jury sitting in Brownsville was not actively investigating Cisneros at the time when the Mr. Mosbacker issued the subpoenas.

Cisneros further argues that the materials obtained by the subpoena were not immediately turned over to any sitting grand jury and therefore were used by Mr. Mosbacker in conducting his own investigation. This argument is without merit. It is settled procedure for the government to analyze evidentiary data for the purpose of reporting back to the grand jury. *United States v. Shotwell Manufacturing Co.*, 355 U.S. 233, 78 S.Ct. 245, 2 L.Ed.2d 234 (1957). The subpoena should call for the witness to come before the grand jury, not to the United States attorney. *United States v. Hedge*, 462 F.2d 220, 222-223 (5th Cir. 1972). This does not preclude the United States attorney from interviewing witnesses in his or her office, and using summaries of those interviews as evidence before the grand jury, so long as subpoenas are not issued for the interviews. *United States v. International Paper Co.*, 457 F.Supp. 571 (S.D. Tex. 1978).

Cisneros attempts to make a distinction between the subpoena power of a United States Attorney under Rule 17 and the subpoena power of a grand jury. Rule 17 governs the issuance of subpoenas in criminal cases. The rule is not limited to subpoenas for trial. *United States v. Beckford,* 964 F.Supp. 1010, 1017 n. 6 (D.C. Va. 1997) (quoting Wright & Miller,

Federal Practice and Procedure § 271 (2000)). Rule 17 governs the issuance of subpoenas in all criminal proceedings in general and in grand jury proceedings in particular. *Bacon v. United States,* 449 F.2d 933, 940-941 (9th Cir. 1971).

In this case, Mr. Mosbacker issued a grand jury subpoena, not a subpoena for trial purposes. Pursuant to Rule 17, the grand jury subpoena was issued by the court clerk which was signed and sealed but otherwise blank, to be filled in by the party requesting it, i.e. Mr. Mosbacker, the United States Attorney. Cisneros contends that Mr. Mosbacker's use of the grand jury subpoena power on behalf, of, but without direction from, an investigating Brownsville Grand Jury resulted in an invalid indictment which should be dismissed. This contention is also without merit. A grand jury may request evidence, but the function of issuing process to obtain it belongs to the prosecutor, who has the subpoena power to bring proof to the courthouse. *See United States v. Thompson,* 251 U.S. 407, 413, 40 S.Ct. 289, 292, 64 L.Ed. 333, 342 (1920); *United States v. Dyno Industries, Inc.,* 418 F.2d 500 (9th Cir. 1969), cert. denied, 397 U.S. 937, 90 S.Ct. 946, 25 L.Ed.2d 116 (1970) (normal practice for the United States Attorney to cause subpoenas to be issued).

It is of no significance that a different grand jury, from the one which subpoenas the evidence, is presented with that evidence. This procedure is common. *See United States v. Thompson,* 251 U.S. 407, 40 S.Ct. 289, 64 L.Ed. 333 (1928); *United States*

v. Owens-Corning Fiberglass Corp., 271 F.Supp. 561, 566 (N.D.Cal.1967); *United States v. Culver,* 224 F.Supp. 419, 432 (D.Md.1963); *In Re Grand Jury Investigation of Banana Industry,* 214 F.Supp. 856 (D.Md.1963). *United States v. Kleen Laundry & Cleaners, Inc.,* 381 F.Supp. 519, 522 (D.C.N.Y.1974) (fact that United States attorney's office obtained defendants' books and records through the use of a subpoena issued in the name of a grand jury not in session returnable when the grand jury was expected to be sitting on return date and fact that grand jury was not consulted or notified did not render indictment invalid nor evidence obtained illegal).

Cisneros also argues that the structural protections of the grand jury were compromised and rendered the proceedings fundamentally unfair, thereby mandating a presumption of prejudice. Cisneros fails to show exactly how structural protections were compromised in accordance with the applicable case law. It appears that Cisneros misunderstood the types structural protections, set forth by the Supreme Court, which trigger the presumption.

In order for Cisneros to demonstrate ineffective assistance of appellate counsel, she must show that she would have prevailed on this claim on appeal. Under *Nova Scotia,* Cisneros was required to demonstrate that the prosecutor's misconduct, if any, effected the grand jury's decision to indict. As the analysis above clearly delineates the shortcomings of Cisneros' claim on this issue, prejudice has not been shown.

(2) FBI Agent Church's Grand Jury Testimony

Cisneros argues that the government engaged in non-constitutional prosecutorial misconduct by painting an unfair presentation to the grand jury and sponsoring false or perjured testimony by Agent Church. Cisneros points to five statements made by Agent Church given during his grand jury testimony which she believes conflicted with other evidence in the case which painted a false impression to the Houston Grand Jury, and was in effect, perjured testimony: (1) " – after the initial meeting, he [Garza] understood that the boy was supposed to be killed"; (2) "[Garza] crossed back over [from Mexico] sometime in the afternoon or evening. He [Garza] was not sure of the time when he came over"; (3) "[Garza] stated he always would do this [call Maria Martinez] by making collect calls from public telephones in Matamoros, Mexico"; (4) "there was activity at a safe deposit box at Texas Commerce Bank in Brownsville, Texas" [on March 3, 1993]; (5) "[the State] prosecuted or actually convicted Cisneros/Daniel Garza of the murder and the conspiracy."

Neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. *See Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406 (1956). Indictments are not open to challenge upon ground that they are not supported by adequate or competent evidence and neither justice nor concept of a fair trial requires establishment of rule permitting such

challenge. *Id.* The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. *See United States v. Calandra,* 414 U.S. 338, 344-45, 94 S. Ct. 613, 618, 38 L.Ed.2d 561, 569 (1974). Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. *Id.* The Supreme Court in *United States v. Williams,* 504 U.S. 36, 112 S.Ct. 1735 (1992), aptly described the independence of the grand jury:

> "Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all." *Id.* at 49-50, 1743.
>
> Requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body. It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge." *Id.* at 51, 1744.

As to Cisneros' allegation of perjury by Agent Church, it is a violation of 18 U.S.C. § 1623(a) to knowingly make a material false declaration before

the grand jury. The test of materiality is whether the false testimony was capable of influencing the tribunal on the issue before it. *Blackmon v. United States,* 108 F.2d 572, 573 (5th Cir. 1940); *Barnes v. United States,* 378 F.2d 646, 649 (5th Cir. 1967), cert. denied, 390 U.S. 972, 88 S.Ct. 1056, 19 L.Ed.2d 1184 (1968). A district court may dismiss the indictment upon a finding that the Government *knowingly* sponsored the perjured testimony. *See United States v. Strouse,* 286 F.3d 767, 775 (5th Cir. 2002) (emphasis added). Cisneros argues that the government had knowledge of the perjured testimony because "clearly, the prosecutor in this case was every bit aware of the evidence that existed as of the date of the grand jury". *Cisneros' Motion to Vacate,* p. 186. Further, Cisneros contends that the false testimony "was material because the vast majority of it related to the two jurisdictional bases which comprised the first element of the offense of murder for hire." *Id.*

As to Statement No. 1, Cisneros argues that there is conflicting evidence from the state court case that Daniel Garza was to find someone to "beat up" Joey Fischer, which was not made available to the grand jury. A review of the record shows that on February 5, 1998, Garza gave a statement to the FBI, indicating that during phone conversations with Martinez, she inquired about the job to kill Fisher. The fact that there is other evidence which suggests that Garza was initially asked to find someone to beat up Fischer goes to the adequacy or the competency of the evidence, not that Agent Church fabricated his

statement " – after the initial meeting, he [Garza] understood that the boy was supposed to be killed".

As to Statement No. 2, Cisneros argues that Garza's sworn testimony at the punishment phase of his state trial, indicated that Garza's encounter with Olivarez occurred in the afternoon, therefore Agent's Church's testimony (that Garza's encounter with Olivarez was evening or afternoon) was conflicting, It appears that Cisneros has misinterpreted Agent Church's testimony, which relates to the time of day when Garza crossed over the border from Mexico into the United States and does not relate to the encounter with Olivarez. Cisneros' argument that Agent Church fabricated the timing of the encounter is misplaced. Even if the Court extends Cisneros' argument to reach the issue of conflicting evidence about the timing of Garza's crossing, it merely goes to the adequacy or the competency of the evidence, which is not adequate cause for dismissal of the indictment. The fact that Agent Church stated afternoon or evening, in the alternative, does not demonstrate a material false statement. There was sufficient truthful testimony before the grand jury to support the indictment returned.

As to Statement 3, Cisneros argues that the subpoenaed phone records do not show collect calls were made to Maria Martinez, therefore Agent Church's testimony that Garza called Martinez collect from Mexico was conflicting. The record shows that Garza was interviewed by FBI Agents Church and Vela on February 18, 1998. The memorandum of

interview reflected that Garza made collect calls to Martinez from public telephones. Later, at trial, Garza testified that he may have called Martinez collect on one occasion, but the FBI was mistaken if they wrote down that all of Garza's calls to Martinez were collect. This conflict may have been due to misunderstanding of term "collect" calls, as trial testimony revealed that Garza made calls from "casetas" in Mexico, which the FBI Agents may have misconstrued as collect calls. It stands however, that at the time of Agent Church's grand jury testimony, the February 18th interview, left him with the impression that Garza had made collect calls. The fact that this testimony turned out to be in conflict with the subpoenaed phone records does not equate to perjury. Cisneros argument goes to the adequacy or the competency of the evidence, which is not adequate cause for dismissal of the indictment.

As to Statement No. 4, Cisneros argues that evidence in Cisneros' state court trial shows: (1) that bank records indicated Cisneros accessed her safety deposit box on either March 2, or March 3, of 1993, at 10:28 a.m.; (2) Cisneros attended a doctor's appointment the morning of March 3, 1993; and (3) Martinez testified in the state ease that she received the money from Cisneros on March 3, 1993, between 8:30 a.m. and 9:00 a.m. Cisneros argues that this is in direct conflict with Agent Church's testimony that Cisneros accessed the deposit box on March 3, 1993. The state court testimony by Karen Wood Stevenson, indicated that the record of safety deposit box entry was

unclear as to the date Cisneros accessed the box, but appeared to be either March 2, or March 3. This record may have been the basis for Agent Church's testimony. The fact that Cisneros may have attended a doctor's appointment after she paid Martinez, does not show Agent Church fabricated his testimony. The fact that Martinez received money on March 3, 1993, before Cisneros accessed her safety deposit box does not show that Agent Church fabricated his testimony. It is possible that Cisneros may have used other funds to pay Martinez and not funds removed from her box on March 3, 1993. Even if the grand jury had been provided testimony that Cisneros accessed her safety deposit box on March 2, 1993, (the day before the payment was made to Martinez) that evidence would not have substantially influenced the grand jury to not indict Cisneros. If anything, it would have strengthened the case against Cisneros.

As to Statement No. 5, Cisneros argues that the record of conviction from the state court case shows that Cisneros and Garza were only convicted of murder and not both murder and conspiracy, as testified by Agent Church. Cisneros fails to provide an explanation as how this evidence, had it been provided to the grand jury, would have influenced their decision to indict Cisneros. In any event, Agent Church testified, "[the State] prosecuted or actually convicted Cisneros/Daniel Garza of the murder and the conspiracy." The use of the connector "or" makes the statement somewhat ambiguous as to which crimes Cisneros was prosecuted with and which

crimes she was ultimately convicted of. The fact that this testimony is in conflict with Cisneros record of conviction, does not equate to perjury and Cisneros argument on this point goes to the adequacy or the competency of the evidence, which is not cause for dismissal of the indictment.

A review of Agent Church's statements in conjunction with the other evidence does not show them to be "false" or "material" (i.e. any misleading statements by Agent Church did not substantially influence the grand jury's decision to indict Cisneros). The inconsistencies and conflicts appear to go to the adequacy and competency of the evidence and would not have substantially influenced the grand jury's decision to indict Cisneros. In the event that Cisneros had shown false and material testimony was presented, Cisneros has not shown that the government had knowledge of it.

In order for Cisneros to demonstrate ineffective assistance of appellate counsel, she must demonstrate that she would have prevailed on this claim on appeal. Under *Nova Scotia,* Cisneros must show prejudice, i.e. that the unfair presentation to the grand jury, if any, and the Government's knowingly sponsored perjury, if any, effected the jury's decision to indict. As the above analysis exposes the weakness in Cisneros' arguments, it is clear that Cisneros has not made the requisite showing.

IV. Recommendation

Cisneros, pursuant to 28 U.S.C. § 2255, alleges ten violations of her constitutional rights. A thorough review of Cisneros' arguments on all points reveals they are without merit.

IT IS RECOMMENDED that Respondent's Motion to Dismiss (Docket No.5) be GRANTED and Petitioner's § 2255 motion (Docket No. 1) be DENIED.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996).

DONE at Brownsville, Texas, this 20th day of October, 2005.

/s/ John Black
John Wm. Black
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
Respondent,	§	C.A. NO. B-02-191
	§	(CR. NO. B-98-124-01)
V.	§	
DORA GARCIA CISNEROS	§	
Petitioner.	§	

ORDER

Before the court is Dora Garcia Cisneros' Objections to the Magistrate Judge's Denial of her Motion for Discovery, and Motion for Reconsideration, or, In the Alternative, Motion for Interlocutory Appeal and Stay of Proceedings Pending Appeal.

The court has considered the matter and believes that the objections are without merit and that the requested discovery is inappropriate under the particular facts of this case. Accordingly, Cisneros' "objections" to the United States Magistrate Judge's Order of May 16, 2005, are hereby overruled. The matter is referred back to the United States Magistrate Judge with the directive to continue the consideration of the § 2255 motion which has yet to be addressed.

Signed this the 9th day of September, 2005.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

DORA GARCIA CISNEROS,	§	
Petitioner,	§	
	§	CIVIL ACTION
vs.	§	No. B-02-191
UNITED STATES OF AMERICA,	§	
Respondent.	§	

ORDER DENYING MOTION FOR DISCOVERY

I. INTRODUCTION

Pending before the Court is Petitioner, Dora Garcia Cisneros's (hereinafter "Cisneros") Motion for Discovery and Memorandum of Law in Support (Docket No. 9). Cisneros's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C § 2255 is also pending before the court. (Docket No. 1). Cisneros's §2255 Motion states ten claims for relief, which will be addressed in due course. Having reviewed the Motion for Discovery, the record, and the relevant law, the Court **DENIES** Cisneros's Motion for Discovery.

II. BACKGROUND

The underlying factual and procedural background of the instant case has been recited by the Fifth Circuit in a detailed panel opinion.[1]

III. CISNEROS'S DISCOVERY MOTION

In her Motion for Discovery[2], Cisneros seeks to obtain the deposition of the following individuals: 1) FBI Special Agent Freddy Vela; 2) FBI Special Agent David Church; 3) Assistant United States Attorney Oscar Ponce; 4) Assistant United States Attorney Mervyn M. Mosbacker. Cisneros also seeks "[a]ny and all evidence of interviews by Government agents with Daniel Garza". Specifically, Cisneros states that "the Government knew that, without some alteration in Garza's testimony from his pretrial statements, it would fail to prove beyond a reasonable doubt the existence of phone calls that could provide the jurisdictional nexus."

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[1] *United States v. Cisneros*, 203 F.3d 333, 3339 (5th Cir. 2000).

[2] Such discovery motion was filed after Cisneros's §2255 motion was filed. However, this Court will first address Cisneros's Motion for Discovery (Docket No.9). In a separate order, the court will address Cisneros's §2255 Motion (Docket No. 1).

IV. DISCUSSION

Under the rules governing §2255 proceedings, Cisneros may "invoke the process of discovery available under Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." 28 U.S.C. § 2255 Rule 6(a); *United States of America v. Webster,* 392 F.3d 787, 801 (5th Cir. 2004). The decision to grant discovery is left to the sound discretion of the district court. *East v. Scott,* 55 F.3d 996 (5th Cir. 1995).

Here, Cisneros requests the depositions of the above-named individuals "[o]n the circumstances wherein Daniel Garza's accounts relevant to the jurisdictional nexus in the offense for which Cisneros was convicted changed between the final interview . . .[.]"[3] According to Cisneros, Garza's testimony differed from his initial interviews and his testimony at trial. Cisneros suggests that the depositions of the above-named individuals would establish the missing jurisdictional element for a murder-for-hire conviction.

In a panel opinion, the Fifth Circuit expressly concluded[4]

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[3] Motion for Discovery and Memorandum of Law in Support, pp. 6; B-02-CV-191; Docket No. 9

[4] *United States v. Cisneros,* 203 F.3d 333, 344 (5th Cir. 2000).

> "Given [Garza's] language difficulties, some confusion during the interview with [FBI special agent] Church would be expected. . . . It is not [the Fifth Circuit's] province to become embroiled in a credibility debate between Church and Garza."

At trial, Garza was subjected to cross-examination. His testimony was evaluated by a jury which convicted Cisneros. *United States v. Gaytan,* 74 F.3d 545, 555 (5th Cir. 1996).

V. CONCLUSION

In the exercise of discretion, this Court finds that there is no good cause to allow discovery. For the reasons stated herein, the court **DENIES** Cisneros's Motion for Discovery. (Docket No. 9).

DONE at Brownsville, Texas, this 16 day of May, 2005.

/s/ John Wm. Black
John Wm. Black
United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-41686

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DORA GARCIA CISNEROS

Defendant-Appellant

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Appeal from the United States District Court for the Southern District of Texas, Brownsville

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(Filed Jul. 10, 2008)

Before REAVLEY, SMITH and DENNIS, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is [denied].

[/s/ TMR] [/s/ JS] [/s/ JLD]
